80-698

No. ——

Supreme Court, U. S.
FILED
OCT 29 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEWSPAPER PRINTING CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

—and—

TULSA TYPOGRAPHICAL UNION, LOCAL NO. 403,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October, 1980

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QUESTIONS PRESENTED

1. Whether, in converting to new technology which inherently blurs traditional work flow and assignments among separate employee groups, an employer bargaining in subjective good faith, who declines to readopt old collective bargaining agreement language combining an exclusive grant of work jurisdiction with an open-ended definition of the bargaining unit and instead proposes and insists to impasse upon contract language which is consistent both with the realities of the parties' historical working relationship and the impact of the new technology on work flow and which does not impose representational choices upon employees who have not selected the bargaining union as their representative, nevertheless violates the National Labor Relations Act.

2. Whether an employer found by the National Relations Board to have refused to bargain in good faith may be ordered to agree verbatim to old collective bargaining agreement language encompassing both mandatory and permissive subjects of bargaining.

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A. The contract language proposed by Petitioner lawfully accommodated the historical working relationship between the parties with policies deeply rooted in the National Labor Relations Act—the self-determination rights of its other employees and its own right to preserve management prerogatives in the face of new technology adopted for valid business reasons. Petitioner's insistence to impasse upon that language and correlative refusal to reaffirm obsolete language verbatim did not *per se* amount to a refusal to bargain in good faith. The contrary decision below conflicts with the application of those core labor relations policies by this Court and other courts of appeal	19

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B. The jurisdiction-unit clause of the expired collective bargaining agreement deals directly with substantive terms and conditions of employment which are mandatory subjects of collective bargaining. The judgment below enforces a Board order compelling Petitioner to reaffirm that language verbatim, thereby forcing agreement to substantive contractual provisions. The decision below thus squarely conflicts with this Court's seminal decision in *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970) 26

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TULSA TYPOGRAPHICAL UNION, LOCAL NO. 403,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Newspaper Printing Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in the above entitled case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 625 F.2d 956 (1980) and is reprinted in the Appendix hereto at pp. 1a-22a. The Decision and Order of the National Labor Relations Board, enforced by the Court of Appeals, is reported at 232 N.L.R.B. 291 (1977) and is reprinted in the Appendix hereto at pp. 23a-30a. The Decision of the Administrative Law Judge is annexed to

that Decision and Order commencing at 232 N.L.R.B. 293 and is reprinted in the Appendix hereto at pp. 31a-98a.

JURISDICTION

The opinion of the Court of Appeals was rendered on May 19, 1980. Thereafter, a timely petition for panel rehearing and suggestion for rehearing *en banc* was denied on September 9, 1980, and judgment was entered on that date. (App. 99a-102a). By order dated September 29, 1980, the court below recalled its mandate. (App. 103a-104a). This petition for certiorari was filed within 90 days of entry of the order denying the petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of

. . . .

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

. . . .

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

. . . .

STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit which ordered enforcement of a decision and order of the National Labor Relations Board. To facilitate an understanding of the important issues implicated in this case, before reciting the underlying facts

material to consideration of the questions presented, petitioner will briefly overview the historical background of technological development in the printing industry. Petitioner will also trace the course of the administrative and judicial proceedings below.

A. Historical Overview

For more than four hundred years after the invention of movable type, generally attributed to Johann Gutenberg, *circa* 1450 A.D., there were no material changes in the methods of printing. The industrial revolution brought with it, however, two innovations which dramatically increased the volume of production—the rotary press and the linecasting machine. These developments made possible the newspaper's role as the first truly mass medium of communication, reaching many thousands of readers on a daily basis.

As the newspaper industry entered the twentieth century, the basic so-called "hot metal" letterpress printing process was firmly established. That system essentially divided newspaper production work into four phases—copy generation, typesetting, plate-making, and press operation. "Copy," that is the text and pictorial matter to appear in print, would be created and revised by advertising department personnel and editorial department personnel, the latter being responsible for news stories, features, and all other nonadvertising matter. The tangible form of text copy, a typescript, would then be physically sent to the department known as the "composing room," together with a specification of the format in which the item was to be run. There, the text would be cast into metal type by means of a linecasting machine which melted lead alloy into lines of type as directed by the machine operator. The linecasting machine operator performed essentially a dual function—"rekeyboarding" the text, thereby converting its tangible form from two to three dimensions (typescript to raised metal

type) and determining the spacing of letters and words and the hypenation of words which must be split on to two lines so as to produce justified lines of type. While the former function required a certain degree of manual dexterity, it is the latter which embodied the traditional skills of the typesetter's craft.

The cast lines of type were then assembled and locked into wooden frames known as "chases" in the form of "dummy pages," corresponding to each page of the newspaper to be printed. The great mass and flat form of the dummy pages were, however, unsuitable for direct use on the high speed cylindrical rolls of a newspaper's high speed rotary presses. They were accordingly used to make the thin semi-cylindrical press plates by a process known as stereotyping, whereby the assembled metal type was used to physically deform a flexible stereotype matrix to exactly reproduce the dummy page. The matrix would then be bent to conform to the diameter of the press cylinders and used as a mold into which molten lead alloy was forced to make the actual plates.

In the actual press run, the plates were mounted on the press cylinders and newsprint fed to the press in roll form, thereby producing the pages of the newspaper. The continuous webs of pages printed by the press were simultaneously assembled, folded, and cut to form the finished product, ready for distribution.

Over the years, a number of refinements have been made in composing room operations, the effect of which has been to automate the typesetting functions of composing room personnel. For example, linecasting machines were modified to accept perforated paper tape input in lieu of direct "keyboarding," thereby permitting several operators at separate keyboard stations to produce tape to be fed to a single linecasting machine. While productivity increased, hypenation and justification decisions were still made by skilled typesetters. Then

special purpose computers were developed which were programmed to convert a perforated tape on which a raw stream of text had been encoded (known as "idiot tape") into hypenated and justified tape which could be fed directly to a linecasting machine. Although the idiot tapes were initially prepared by rekeyboarding typescript, optical character recognition ["OCR"] equipment was thereafter developed which was capable of reading the typescript directly and converting the text to electrical impulses from which idiot tapes could be generated or which could be electronically transmitted directly to the typesetting computer. The traditional material transformations of the hot metal indirect process (text to metal type to metal printing plate) were not directly affected by these innovations.

In recent years however, technological developments have shaken the very foundation of traditional production. With the advent of the "cold type" process, combining photocomposition [1] and direct printing, cast metal type and printing plates became obsolete in the high volume environment of the newspaper printing plant. Photocomposition equipment electronically and optically produces properly formatted copy in "camera ready" form. This camera ready copy may be cut and pasted on to dummy pages and then optically reproduced directly on photosensitive press plates. The direct printing process eliminates the need for large numbers of skilled craftsmen, for the camera equipment is highly automated. Moreover, the typesetting computer technology developed to drive linecasting machinery has been

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[1] "The term 'photocomposition' appears to be the current word of art to describe virtually all types of document composition through use of modern photographic processes. Type matter that is 'photocomposed' is usually set by a computerized process that makes the type indistinguishable to the naked eye from 'hot type' set in the traditional typographic method." B. Boskey and E. Gressman, The Supreme Court's New Rules for the Eighties, 85 F.R.D. 487, 493 n.11 (1980).

adapted to photocomposition equipment. Indeed, entire pages can be photocomposed by computer.

Inherent in the hot metal process were a number of operational and safety drawbacks. The equipment was bulky, noisy, and emitted noxious lead fumes; there was the ever present danger of spilled molten metal. The massive assembled dummy pages and raised metal press plates were difficult to handle safely and exposed workers to contact with lead. These problems were eliminated by use of cold type equipment and processes.

Finally, computer technology has developed the "front end system" whereby editorial and advertising department personnel no longer create any tangible form of copy. Video display terminal ["VDT"] units each consisting of a keyboard and display screen have now replaced typewriters. The VDT units are connected to a central general purpose high speed digital computer which receives and stores the copy as it is created and converted into electrical impulses at the writer's keyboard. Thereafter rewriting and editing operations can be performed by recalling the copy on the video screen and entering the revisions through the keyboard. The final creative product is then electronically transmitted to photocomposition equipment to be made up into press plates.[2] Thus, the traditional craft functions of typesetters and stereotypers—the conversion of copy from one tangible form to another—have been automated out of existence.

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[2] In addition to the word processing and typesetting functions described in the text, the general purpose computer could be programmed to automate billing and other business needs of the publisher. While these operations are done on a time-shared basis, the computer operates with split-second speed, giving each user the appearance of instantaneous operation. Scores of VDT units can be simultaneously used by employees working in various departments of the newspaper facility.

The foregoing has been, of necessity, somewhat simplified and generalized. The development of printing technology is discussed more comprehensively in the trade literature and, to the extent labor-management controversies have ensued, in reported decisions of the courts and the National Labor Relations Board. *See generally, e.g., Omaha Typographical Union, Local No. 190* v. *N.L.R.B.*, 545 F.2d 1138 (8th Cir. 1976); *Graphic Arts International Union* v. *N.L.R.B.*, 505 F.2d 335 (D.C. Cir. 1974); *N.L.R.B.* v. *Columbia Tribune Publishing Co.*, 495 F.2d 1384 (8th Cir. 1974); *Newspaper Guild of New York, Local 3*, 249 N.L.R.B. No. 135 (1980); *Muncie Typographical Union No. 332*, 235 N.L.R.B. 874 (1978); 2 International Typographical Union, *Lessons in Printing* 1-6 (1972); A. Woods, *Modern Newspaper Production* 42-132 (1963); 3 International Typographical Union, *Lessons in Printing* 3-23 (1956); W. Mengel, *Ottmar Mergenthaler and the Printing Revolution* (1954).

B. The Underlying Controversy

The essential facts, which are not in material dispute, are summarized in the reported opinion of the court below in a section entitled "The factual background." (625 F.2d at 958-61; App. 2a-10a). The administrative law judge's decision sets forth the pertinent facts in more detail (232 N.L.R.B. at 294-303; App. 33a-66a).

Petitioner Newspaper Printing Corporation ["NPC"] is an Oklahoma corporation maintaining its office, printing facilities, and principal place of business in Tulsa, Oklahoma. As agent for two daily newspaper publishers, NPC prints, solicits advertising, produces and distributes the *Tulsa Tribune* and the *Tulsa World*. Tulsa Typographical Union, Local No. 403 ["Union"], a subordinate local of the International Typographical Union, is one of several labor organizations representing those NPC employees who have chosen union representation. The Union repre-

sents NPC's composing room employees and has maintained a collective bargaining relationship with NPC since 1905. The last collective bargaining agreement between NPC and the Union extended from February 1, 1973 to January 31, 1976. This case arises out of negotiations undertaken in 1975 and 1976 for a new agreement to replace the one then expiring.

Prior to the commencement of negotiations in the fall of 1975, NPC printed the *Tulsa World* and *Tulsa Tribune* primarily by the hot metal process.[3] The negotiations coincided, however, with two external events which made it impractical for NPC to continue utilizing hot metal printing. The Occupational Safety and Health Administration had determined that NPC's hot metal equipment violated its standards and had commenced enforcement proceedings against NPC. Shortly thereafter, NPC was notified that replacement parts for its hot metal equipment would no longer be stocked in this country. (232 N.L.R.B. at 295; App. 37a)

Forced to abandon hot metal printing, NPC sought to implement in early 1976 a major technological change—total conversion to the modern computerized cold-type process.

> "The first phase, which was to be completed by September, 1976, entailed the total conversion of the composing room to 'cold type.' . . . The second phase envisioned installation of a large and complex general-purpose computer system which would be used in conjunction with phototypesetting work and also for billing and other business purposes. Lastly, both the newsroom and classified advertising room would be connected to the computer system by means

[3] The bulk of typesetting work was performed on linecasting and other hot metal equipment. NPC did, however, utilize some photocomposition and associated special purpose computer equipment in the composing room. (232 N.L.R.B. at 297; App. 44a-45a)

> of video display terminals. This would enable newspaper copy (ads or news articles) to be electronically transmitted directly from the newsroom and classified ad room terminals to the general purpose computer for storage and recall. The estimated time of completion of the latter two phases was May, 1977, and August 1, 1977, respectively." (625 F.2d at 959 n. 4; App. 4a-5a).

Thus, it would not be necessary to "rekeyboard" typewritten news and advertising copy created in those departments into the photocomposition equipment, which replaced the linecasting machines in the composing room. Keyboarding would be performed only once, by the person who originally created the newspaper copy in a department remote from the composing room. The necessity of employing skilled personnel to perform these functions in the composing room would thereby be obviated. The Union had never been certified or voluntarily recognized as the collective bargaining representative of newsroom or classified advertising room employees.

In negotiation sessions held during November and December of 1975 and January of 1976, NPC and Union negotiators focused upon changes which NPC's planned conversion was certain to entail. NPC wished complete flexibility in placing the new equipment in its various operation departments and in making work assignments to various employee groups. The Union, on the other hand, was concerned about the loss of jobs resulting from the automation of composing room functions and the concomitant need for fewer and less skilled employees to perform the remaining composing room functions.

The then-expiring collective bargaining agreement contained a so-called "jurisdiction-unit" provision which recited that

> "Jurisdiction of the Union and the appropriate unit for collective bargaining is defined as includ-

> ing all composing room work and includes [certain listed job] classifications. . . . The employer shall make no other contract covering work as described above, which shall be performed only by journeymen and apprentices, especially no contract using the word 'Stripping' to cover any of the work above mentioned." (232 N.L.R.B. at 294 n. 1; App. 34a).

The Union sought to have this language renewed verbatim, recognizing that it imposed limits upon NPC's ability to install new video display terminal units in other departments, where the Union did not represent the employees who would operate the new equipment, and its ability to assign employees in those departments to perform work thereon.

NPC drafted a proposed amendment of this provision essentially expressed in the following language:

> "The jurisdiction of the Union and the appropriate unit for collective bargaining is defined as including only those employees engaged in all work which the Employer may from time to time designate to be performed in the Composing Room. It is the express intention of the Employer to accomplish his complete production needs in the manner which he determines to be the most effective and economical method to fulfill the work requirements." (625 F.2d at 959, App. 5a.

As NPC's negotiator explained, this language was designed to allow NPC the freedom from contractual restraints upon its right to implement the new technology. In view of its significant capital investment in the new machinery and processes, NPC sought complete flexibility in assigning jobs, in placing the new equipment in various departmental locations, and in determining who would operate it. NPC explained to the Union that it was not attempting to limit the Union's historic work jurisdiction which would continue to be commensurate

with the physical boundaries of the composing room. Although numerous other contract proposals were discussed in these meetings and during the course of subsequent negotiations, the parties' major efforts focused upon resolution of the jurisdiction issue and the impact of the new technology upon bargaining unit employees.

Shortly before the expiration date of the existing agreement, NPC presented the Union with a letter requesting to be notified on or before January 30, 1976 as to whether the Union would accept or reject NPC's proposals. Absent acceptance NPC would withdraw its proposals and submit a counterproposal on February 1. The subject of job guarantees for unit employees was discussed but the jurisdiction issue remained unresolved at that session and on the following day.

Having received no response from the Union to that letter, on February 2, 1976, NPC sent a letter to the Union announcing the establishment of certain "working conditions" to remain in effect pending the consummation of a new agreement. The announcements particularly relevant to this proceeding were expressed in the following words:

> "Mr. Robert Melton, President
> Tulsa Typographical Union #403
> P.O. Box 44
> Tulsa, Oklahoma 74102
>
> "Dear Bob:
>
> "In light of the fact that the contract with your Union expired by its terms and notification on January 31, 1976, and pending execution of a new agreement or a continuation of the existing impasse, no provision, past practices or obligations that existed under the prior contract will be effective.
>
> "We announce the following work relationships that will exist not as a contractual understanding but work practices as follows:

"*Wages*: Unchanged.

"*Hours*: Work will continue to be performed as presently scheduled including lunch periods, holidays, and vacations.

"*Working Conditions*: It is the express intention of the Employer to accomplish his complete production needs in the manner which he determines to be the most effective and economical method to fulfill the work requirements.

"In this connection, Management shall exercise the right to cease any procedure or remove any equipment from the composing Room, in the interest of efficiency.

"No duplication of work will be performed between departments, or employees, and should this occur, the Employer shall determine who will do the work.

* * * *

"This is not to the prejudice of the use of the collective bargaining process to reach a new agreement.

"Sincerely,

"Newspaper Printing Corporation

/s/ Kenneth S. Fleming
Vice President/General Manager"

(232 N.L.R.B. at 311; App. 96a-98a).

C. The Administrative Proceedings Below

The Union subsequently filed an unfair labor practice charge, upon which the National Labor Relations Board ["Board"] issued a Complaint alleging that NPC had failed to bargain with the Union in good faith in violation of Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended ["Act"], 29 U.S.C. §§ 158(a)

(1) and (5) in an appropriate unit for collective bargaining consisting of

> "[a]ll composing room employees of Respondent employed at its Tulsa, Oklahoma, facility, including operators, makeup men, advertising makeup men, markup men, machinists, proofreaders, teletype operators, monotype operators, and apprentices, excluding office clerical employees, guards, watchmen and supervisors as defined in the Act, constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act." (Consolidated Complaint ¶ 8; R. 2021)

NPC was specifically alleged to have violated Sections 8(a)(1) and 8(a)(5) of the Act, 29 U.S.C. §§ 158(a)(1), 158(a)(5), by "bargaining to impasse on a contractual provision which failed to sufficiently identify or define the collective bargaining unit or work of said employees so as to allow the Union to engage in meaningful collective bargaining regarding said employees or to otherwise represent said employees" (232 N.L.R.B. at 303, App. 67a).

The working conditions announced by NPC on February 2, 1976 were alleged to constitute unilateral changes not predicated upon a lawful impasse, thus further violating Sections 8(a)(1) and 8(a)(5) of the Act. Following several days of hearings, Administrative Law Judge ["ALJ"] Gerald A. Wacknov issued a comprehensive decision generally absolving NPC of wrongdoing, finding that the parties had reached a lawful impasse on January 21, 1976, principally due to their inability to resolve their work jurisdictional differences (232 N.L.R.B. at 307-08; App. 80a-84a).

The ALJ's analysis proceeded from a trisection of NPC's jurisdiction-unit proposal, the format of which was consistent with both the then expiring contract and the Union's initial proposal. As the ALJ observed "[r]educed to its component parts, the clause defines the appropriate unit for purposes of collective bargaining, es-

tablished the Union's jurisdictional boundaries, and operates as a management rights clause." (232 N.L.R.B. at 303; App. 67a). The unit-defining component of the clause, the ALJ found, "unequivocally sets forth an appropriate unit description." (*Id.*).[4] Indeed, "the practical effect of the proposed language" was found "to more carefully delimit the unit consistent with the realities of the working relationship between the parties through the years." (232 N.L.R.B. at 304; App. 70a). The jurisdictional component of the proposal was likewise found to be proper (232 N.L.R.B. at 304-05; App. 71a-72a), as was the management rights component (232 N.L.R.B. at 305-07); App. 72a-79a). The ALJ accordingly concluded that NPC had bargained in good faith and that a lawful impasse had resulted. (232 N.L.R.B. at 307-08); App. 80a-84a). He explicitly found, after a review of the entire course of negotiations, that NPC had not been motivated by anti-union animus and had not otherwise lacked good faith. (232 N.L.R.B. at 307; App. 79a). NPC's post-impasse changes, which were within the scope of its pre-impasse proposals, were thus lawful. (232 N.L.R.B. at 308-09; App. 84a-88a).

The General Counsel and the Union filed exceptions with the Board, challenging the findings and conclusions of the Administrative Law Judge. A three member Board panel, while essentially adopting the ALJ's subsidiary findings, disagreed with his construction of NPC's jurisdiction-unit proposal, his analytical methodology and legal conclusions. The Board did not disturb the ALJ's findings that the parties reached a bargaining impasse on January 21, 1976, principally due to their jurisdictional

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[4] The union definition component of the proposal was found to be "The . . . appropriate unit for collective bargaining is defined as including only those employees engaged in all work . . . in the Composing Room." (232 N.L.R.B. at 303 n.15; App. 67a). This construction was consistent with the unit definition set forth in the Consolidated Complaint quoted in the text, *ante* at p. 14, the appropriateness of which NPC made no effort to controvert.

differences. Contrary to the ALJ, however, the Board concluded that NPC's insistence to impasse upon its jurisdiction-unit proposal was unlawful for two reasons.

In the Board's view, NPC jurisdicti[illegible]-unit proposal could not "properly be analyzed by removing the management rights language," which the Board found "to be an integral part of the unit definition in that it allows [NPC] unilaterally to determine who is in the unit at any given time." (232 N.L.R.B. at 291; App. 25a). Moreover, the Board held that NPC had insisted to impasse over modification of the previously recognized bargaining unit definition, a permissive subject of bargaining, thereby tainting the impasse. (232 N.L.R.B. at 292; App. 26a).

The Board's remedial order contained provisions directing NPC to

> "(a) [r]estore and abide by the preexisting practices regarding . . . jurisdiction and management rights . . . as such matters were applied, operated, and interpreted under the collective bargaining agreement, ... [and]
>
> "(b) [u]pon request bargain collectively in good faith with [the Union] as the exclusive representative of its employees in the appropriate bargaining unit as defined in the most recent collective-bargaining agreement, with respect to wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement." (232 N.L.R.B. at 292, App. 28a).

D. The Judicial Proceedings Below

NPC timely petitioned the United States Court of Appeals for the Tenth Circuit pursuant to Section 10 (f) of the Act, 29 U.S.C. § 160(f), for review of the Board's decision and order. The Board cross-petitioned for enforcement of its order pursuant to Section 10(e) of the Act, 29 U.S.C. § 160(e), which petition the Union, as intervenor, supported.

A panel of the Court of Appeals sustained the Board and directed enforcement of its order without modification. Deferring to the Board's judgment, the Court below declined to disturb the Board's interpretation of NPC's proposal as according one party unilateral control over unit scope, hence "inherently inappropriate" (625 F.2d at 962; App. 12a). The court below agreed with the Board that, because the description or size of the collective bargaining unit is not a mandatory subject of bargaining, NPC's insistence to impasse on its jurisdiction-unit proposal was unlawful, notwithstanding the mandatory work jurisdiction and transfer components thereof. (625 F.2d at 963-64; App. 15a-16a). NPC's subjective good faith was rejected as a defense to the *per se* theory on which the case was tried. (625 F.2d at 963 n. 13; App. 14a). Having affirmed the Board's substantive conclusions, the court below upheld the resulting Board order, rejecting NPC's contention that the order compelled it to agree to substantive contract terms. (625 F.2d at 965; App. 19a).

REASONS FOR GRANTING THE WRIT

The questions presented are of exceptional importance, transcending the particular factual situation and parties involved below. The printing industry, particularly that phase of it engaged in the production of daily newspapers, is currently in the throes of a profound technological revolution. As the Eighth Circuit has observed, the stakes are high, for publishers view the new cold type technology as promising a significant reduction in the required complement of skilled personnel while the affected employees and their unions view the technology as a menace. *Omaha Typographical Union, No. 190* v. *N.L.R.B.*, 545 F.2d 1138, 1140-41 (8th Cir. 1976). The new technology impacts on the legal aspects of labor-management relations as well, for "one of the inherent by-products of automation is a blurring of the bargaining unit boundaries." *N.L.R.B.* v. *Columbia Tribune Publishing Co.*, 495 F.2d 1384, 1390 (8th Cir. 1974).

The thorny problems of adapting to automation are compounded for those in the newspaper industry by collective bargaining agreement language inextricably bound up in the work functions of a bygone era. The undersigned are advised that the jurisdiction-unit clause of the expired collective bargaining agreement here at issue is substantially identical to similar clauses currently incorporated in literally hundreds of collective bargaining agreements between newspaper publishing companies and local unions affiliated with the International Typographical Union. Indeed, the clause at issue here is viewed by the Board as defining "the traditional composing room unit" (232 N.L.R.B. at 291 n. 3; (App. 25a).[5]

The decision below consigns newspaper publishing companies to a prison bounded by verbal formalisms, for the ALJ's undisputed findings make it clear that NPC's proposed language was designed to "more carefully delimit the unit consistent with the realities of the working relationship through the years." (232 N.L.R.B. at 304; App. 70a). If the decision below goes unreviewed by this Court, publishers face the unacceptable choice between either reaffirming outmoded contract language under which, absent a willingness to trample upon employee

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[5] While the instant case is believed to be the first to have presented this issue for judicial review, a number of cases have been presented to the Board involving collective bargaining over cold type conversion in the face of the traditional jurisdiction-unit clause. *See, e.g., Newspaper Printing Corp.* [*Nashville, Tenn.*], 250 N.L.R.B. No. 132 (1980), *petition for review pending* (6th Cir. No. 80-1567); *Times-Herald, Inc.*, 249 N.L.R.B. No. 4 (1980); *Beaver County Times*, Case No. 6-CA-10976 (Gen. Counsel 1978); *Durham Herald Co.*, Case No. 11-CA-7979 (Gen. Counsel 1979); *Hopewell Publishing Co.*, Case No. 5-CA-11863 (Regional Dir. 1980); *Dothan Eagle Division of Thompson Newspapers, Inc.*, Case No. 15-CA-7412 (Regional Dir. 1980); *Truth Publishing Co.*, Case No. 25-CA-11545 (Regional Dir. 1980); *Texas Newspapers, Inc.*, Case No. 23-CA-6921 (Regional Dir. 1978).

rights of self-determination, they must turn their backs on modernization or inviting condemnation by the Board for seeking to negotiate contractual language more in keeping with the current state of the art. Were the only vice of the "traditional" jurisdiction-unit clause its antiquated terminology, a less substantial question of federal labor law would be involved. However, the open-ended unit definition and verbal intertwining of mandatory and nonmandatory subject matters expressed in that clause implicate core labor relations policy issues which should be settled by this Court.

A. The contract language proposed by Petitioner lawfully accommodated the historical working relationship between the parties with policies deeply rooted in the National Labor Relations Act—the self-determination rights of its other employees and its own right to preserve management prerogatives in the face of new technology adopted for valid business reasons. Petitioner's insistence to impasse upon that language and correlative refusal to reaffirm obsolete language verbatim did not *per se* amount to a refusal to bargain in good faith. The contrary decision below conflicts with the application of those core labor relations policies by this Court and other courts of appeal.

The cornerstone principle of the Act is the protection of employee rights of self-determination, including the right "to bargain collectively through representatives of their own choosing" and the concomitant "right to refrain from" collective bargaining. 29 U.S.C. § 157. The Board is charged with the responsibility of protecting those rights from attack by either employer or union. 29 U.S.C. §§ 158(a)(1), (b)(1)(A). And, once employees have elected to bargain collectively, their chosen representative and their employer have a mutual obligation "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . ." 29 U.S.C. § 158(d). Neither employer nor union can refuse to do so. 29 U.S.C. §§ 158

(a)(5), 158(b)(3).[6] Conversely, where employees have not selected a union to represent them in collective bargaining, the Act forbids their employer from recognizing and bargaining with the union, thereby forcing such representation upon the employees. 29 U.S.C. § 158(a)(2).

The principal vice of the jurisdiction-unit clause of the expired collective bargaining agreement lies in its potential for sweeping into the collective bargaining unit employees who have not chosen the Union to represent them. The court below quite correctly perceived this unit expansion potential, noting that the unit was defined

> "in terms of 'all composing room work', followed by a detailed, open-ended listing of job classifications and descriptions [thereby leaving] room for the contention that the unit included employees performing work beyond the physical confines of the composing room." (625 F.2d at 961 n. 9; App. 11a).

In negotiations for prior contracts, the unit expansion potential of that clause was of purely academic concern, for all "composing room work" had necessarily been done under the technologically static hot-type process within the composing room by composing room employees.

> "There is no record evidence in the instant case, nor did General Counsel or counsel for the Charging Party ever attempt to show, that the unit has ever, in practice, actually included employees performing work outside the composing room despite the contract language which would arguably permit such expansion; nor is there evidence that during the long collective-bargaining relationship under numerous working agreements there was ever a meet-

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[6] Under the Act, however, the Board does not "sit in judgment upon the substantive terms of collective bargaining agreements." *N.L.R.B.* v. *American Insurance Co.*, 343 U.S. 395, 404 (1952). Section 8(d) quite explicitly eschews imposing on either party any compulsion "to agree to a proposal" or requirement to "mak[e] a concession." 29 U.S.C. § 158(d).

> ing of the minds that the unit may encompass employees outside the composing room at some future date." (232 N.L.R.B. at 304; App. 69a-70a).

However, NPC's planned conversion to the cold-type process made unit expansion a very real threat, entailing, as it would, direct electronic transmission of editorial and advertising copy from NPC's editorial and advertising departments, respectively, to the general purpose computer to be used in conjunction with phototypesetting equipment in the composing room. The collective bargaining agreement terminology "composing room work" was relied upon by the Union as its predicate for a claim to representation of the employees in those remote departments assigned as part of their work to create and electronically transmit that copy. (232 N.L.R.B. at 304; App. 68a). Acutely aware of this defect, NPC refused to renew that language in the collective bargaining agreement which would control employee relations during and after the conversion.

The Board turned its back on this defect and the Section 7 rights of these employees, urging that the Union's unit expansion efforts were no defense (Board Brief at 19, n. 8).[7] In accepting the Board's position on that point

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[7] The Board compounds this error by purporting to "find the traditional composing room unit" recited in the jurisdiction-unit clause to be an appropriate unit for collective bargaining. (232 N.L.R.B. at 291 n.3; App. 25a), relying on *Columbia Tribune Publishing Co.*, 201 N.L.R.B. 535 (1973). While a virtually identical collective bargaining agreement provision was involved there, the Board ordered bargaining with respect to a unit defined as "[a]ll *employees in the composing room* at the Company's plant in Columbia, Missouri, *excluding* office clerical employees, guards and supervisors as defined in the Act, and all other employees." 201 N.L.R.B. at 538-39 (emphasis added). And, the instant case was prosecuted on the same theory, paragraph 8 of the Consolidated Complaint alleging that:

> "All *composing room employees* of Respondent employed at its Tulsa, Oklahoma, facility, including operators, makeup men,

(625 F.2d at 965, App. 17a-18a), the court below overlooked NPC's own liability for aiding the Union in the latter's quest for a larger collective bargaining unit. NPC quite properly resisted the Union's claim to representation of editorial and advertising department employees, for NPC would have itself violated Sections 8(a)(1) and 8(a)(2) of the Act, 29 U.S.C. §§ 158(a)(1) & (2), by acquiescing in the union's demand to continue the old language after conversion. *See Metromedia, Inc.* v. *N.L.R.B.*, 586 F.2d 1182 (8th Cir. 1978); *Graphic Arts International Union* v. *N.L.R.B.*, 505 F.2d 335 (D.C. Cir. 1974) ["*G.A.I.U.*"]. Those cases teach the analysis pertinent to evaluation of employer conduct in the face of technological alteration of the nature and flow of work in a multi-departmental/craft operation. Simply stated, an employer is barred by the Act from acceding to one union's demand to represent employees assigned to perform new work, for, as the court below acknowledged (625 F.2d at 962; App. 12a), employee rights of self-determination may not be bargained away by an employer.

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advertising makeup men, markup men, machinists, proofreaders, teletype operators, monotype operators, and apprentices, *excluding* office clerical employees, guards, watchmen and supervisors as defined in the Act, constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act." (R. 2021; ¶ 8) (emphasis added).

NPC did not controvert the appropriateness of this unit. Indeed, the presiding officer viewed a proferred amendment to the above-quoted definition as "very untimely", noting that "it certainly hasn't been litigated by [NPC]" (R. 712). When he indicated his intent to protect NPC's due process rights by recessing the proceedings to afford NPC an opportunity to meet the change, the General Counsel withdrew the amendment (R. 722-23).

Moreover, even if the Board's decision were procedurally unassailable, there is no record support for a finding that the editorial and advertising department personnel responsible for creating and electronically transmitting copy share a community of interest with composing room employees. Absent such evidence, the Board's order can not be enforced. *N.L.R.B.* v. *Meyer Label Co.*, 597 F.2d 18, 20 (2d Cir. 1979).

Thus, in *Metromedia*, the respondent television station acquired portable electronic video cameras known as "minicams" and agreed that the I.B.E.W., which then represented its studio cameramen, would represent the minicam operators. Notwithstanding I.B.E.W. contract language arguably including the minicam operators, the Eighth Circuit held that the employer was not privileged to concede their representation to I.B.E.W., for "minicam work was essentially new work and could not be controlled either by jurisdictional language or by a unit certification preexisting the contemplation of minicams." 586 F.2d at 1188. Similarly, the newspaper publisher in *G.A.I.U.*, preparing for conversion to a direct printing process which created a new form of work, negotiated a contract which recognized one union as the representative of employees who would be assigned to do that work. This premature contractual recognition, the District of Columbia Circuit held, violated the self-determination rights of those employees. 505 F.2d at 337-38.

The court below condemned NPC for refusing to agree to the open-ended jurisdiction-unit clause of the expired agreement. Yet, had NPC done just that, it would have violated the rights of its editorial and advertising department employees who had not then, and to this day have not, authorized the Union to represent them. Employees "should be given an opportunity to determine for themselves which union they wish to represent them, or whether they wish to reject union representation entirely." *Sheraton-Kauai Corp.* v. *N.L.R.B.*, 429 F.2d 1352, 1354 (9th Cir. 1970). NPC acted properly in seeking to more carefully delimit the unit consistent with the realities of the working relationship through the years, thereby respecting rights of composing room employees, who had chosen to be represented by the Union, and editorial and advertising department employees, who had not.

While *Metromedia* and *G.A.I.U.* detail the bargaining obligations imposed by the Act on employers like NPC

facing new technology, the court below gave no consideration to those obligations. The decision below reflects instead, a blind adherence to the concept that "modification in the *scope* of the bargaining unit, whether established by Board certification or voluntary recognition" is a permissive subject of bargaining. (625 F.2d at 963; App. 14a) (emphasis added). The Act, however, does not wed the parties to any particular form of words. An appropriate bargaining unit consists of a group of employees sharing a "community of interest;" neither employer nor union can, by mere manipulation of verbiage, create communities of interest which do not, in fact, exist or disregard communities of interest which do, in fact, exist.[8] The unit here for many years consisted of skilled craft employees who performed a series of interrelated functions necessary to convert copy from one tangible form to another. These employees worked in close physical proximity within the confines of the so-called composing room. There was no real possibility that their functions would be performed by others at remote locations so long as hot type technology was in use. With the conversion to computerized cold type technology, however, the basic conversion function would be wholly eliminated; advertising and editorial department personnel at remote locations electronically would generate and transmit signals which directly controlled photocomposition equipment. The work flow and assignments in the composing room would thereby be radically altered. To leave the bare words of

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[8] Proper bargaining unit analysis entails consideration of the totality of the workplace environment with an eye towards identifying those employee groups which have developed an identity of interests and commonality of concerns. *Meyer Label, supra,* 597 F.2d at 20-22. Among the practical indicia of such a community of interest which must be considered are physical proximity, identical lines of supervision, seniority, and promotion, uniform wage scales, working hours, and fringe benefit packages, shared use of company facilities, and frequent job interchanges. *Id.*

the old unit-defining language unchanged would have greatly expanded the actual scope of the bargaining unit; new words were required to preserve the true substance of the bargaining over the term of a successor-agreement.

The cryptic suggestion that contract language which accords one party unilateral control over unit scope "is inherently inappropriate" (625 F.2d at 962; App. 12a) reveals far too simplistic an approach in this sensitive area. An employer has the inherent management prerogative, absent a contractual provision in which it has bargained away the right, to subcontract work away from members of the bargaining unit. This Court so held in *Fibreboard Paper Products* v. *N.L.R.B.*, 379 U.S. 203 (1964), imposing upon the employer only the obligation to bargain with the union concerning the effects of that action. An employer's right to transfer work to its own employees outside the unit is similarly well established. *See Boeing Co.* v. *N.L.R.B.*, 581 F.2d 793, 796 (9th Cir. 1978); *University of Chicago* v. *N.L.R.B.*, 514 F.2d 942, 949 (7th Cir. 1975). The Ninth Circuit in *Boeing* properly distinguished between a unit definition describing those "certain 'people'" whom the union represents and a contractually agreed grant of work jurisdiction "reserving exclusively for the Union all 'functions' which might normally have been performed by those 'people.'" 581 F.2d at 796. It is of no significance that NPC here bargained to impasse to secure contract language confirming its ability to make mid-term transfers of work at its discretion as the cold type equipment was phased in, deleting at the same time the inconsistent exclusive work jurisdiction provisions of the expiring agreement. NPC simultaneously bargained extensively about the anticipated effects of the new technology and solicited the Union's proposal of specific job guarantees to ameliorate the financial burden on unit members. (232 N.L.R.B. at 297-301; App. 44a-59a). The Act requires no more.

As the above-cited cases teach, NPC was bound in negotiating with the chosen representatives of its composing room employees to respect the self-determination rights of its editorial and advertising department personnel, which the existing jurisdiction-unit clause would have overridden and at the same time was free to unshackle its management prerogatives from the strictures of that very clause. The decision below, however, condemns NPC's legitimate efforts to protect its employee's rights and assert its own inherent prerogatives. NPC was not motivated by anti-union animus and sought only to further the central policies of the Act.

If the decision below goes unreviewed, newspaper publishers, as well as employers in other technologically dynamic industries, must heed two conflicting directives. Faced with a union's insistence upon readopting outmoded and expansive unit-defining language, such employers are damned if they do (*Metromedia* and *G.A.I.U.*), damned if they don't (the decision below), and damned if they refuse to discuss the matter at all (29 U.S.C. § 158(d)). A writ of certiorari should issue so that this Court can settle these important, albeit now confused, issues of federal labor law.

B. The jurisdiction-unit clause of the expired collective bargaining agreement deals directly with substantive terms and conditions of employment which are mandatory subjects of collective bargaining. The judgment below enforces a Board order compelling Petitioner to reaffirm that language verbatim, thereby forcing agreement to substantive contractual provisions. The decision below thus squarely conflicts with this Court's seminal decision in *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970).

It is apparent upon even cursory inspection that the jurisdiction-unit clause of the expired collective bargaining agreement grants the exclusive right to perform certain

work to the Union and restricts NPC in assigning that work. The clause opens with language reciting that the "jurisdiction of the Union" is thereby defined and closes with a sentence barring NPC from making any "other contract covering work as described above. . . ." (232 N.L.R.B. at 294 n. 1; App. 34a) The court below acknowledged that such work assignment matters are mandatory subjects of bargaining. (625 F.2d at 964; App. 15a-16a). NPC was privileged to bargain over revision or elimination of the jurisdictional aspects of that clause, notwithstanding the presence of unit-defining language in the same provision. No principle of federal labor law mandates that contract language bearing on both mandatory and permissive subjects of bargaining be deemed entirely permissive.

NPC does not here quarrel with the proposition that an impasse over both mandatory and permissive issues does not permit an employer to lawfully implement unilateral changes. However, paragraph 2(b) of the Board's order, which the court below enforced, amounts to a remedy which exceeds the bounds of the Board's remedial authority, as delimited by this Court in *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970). That provision of the order is tantamount to a directive to agree to the jurisdiction-unit clause of the expired agreement, mandatory and permissive aspects alike.

As noted above, the statutory duty to bargain does not comprehend any compulsion to "agree to a proposal" or any requirement of "the making of a concession." 29 U.S.C. § 158(d.) This Court has clearly decreed that the legislative dichotomy between duty to bargain and obligation to agree bars the Board from "remedying" a refusal to bargain by compelling agreement on substantive terms. *H. K. Porter Co.*, 397 U.S. at 108. Indeed, unlike the instant case, this Court in *H. K. Porter* had before it an employer found by the Board to have been guilty of

bad-faith bargaining and to have been motivated by anti-union animus in its refusal to agree to deduct union dues from its employees' wages. Even under those more compelling circumstances, this Court set aside an order directing the employer to grant the union a dues check-off clause.

The court below found the *H.K. Porter* doctrine inapposite, on the ground that "[n]owhere in its order does the Board attempt to compel agreement on work placement or any other subject." (625 F.2d at 695; App. 19a). NPC respectfully disagrees, for the court below has misapprehended the significance of the Board's order. Close analysis of that order confirms that the Board has indeed overstepped its authority.

Paragraph 2(b) of the Board's Order requires NPC to bargain with the union

> "as the exclusive representative of its employees in the appropriate bargaining unit *as defined in the most recent collective-bargaining agreement*, with respect to wages, hours, and other terms and conditions of employment, and, if an understanding is reached, *embody such understanding in a signed agreement.*" (232 N.L.R.B. at 292; App. 28a) (emphasis added)

The Board purported to "find the traditional composing room unit set out in fn. 1 of the Administrative Law Judge's Decision" to define the unit appropriate for purposes of collective bargaining. (232 N.L.R.B. at 291 n. 3; App. 25a). However, the cited footnote merely quotes sections 2 and 3 of the parties' expired collective bargaining agreement, the latter section being the jurisdiction-unit clause discussed above, and was in no sense a finding by the Administrative Law Judge of any collective bargaining unit.[9] Indeed, Judge Wacknov's finding on this

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[9] Such a finding, had it been made, could not stand, for the unit issue was not litigated by the parties and the pertinent community of interest indicia were not developed for the record. *See* notes 7 and 8, *ante*.

issue was precisely to the contrary; it was NPC's contract proposal which "in fact, define[d] with particularity the appropriate collective bargaining unit." (232 N.L.R.B. at 304; App. 70a) (footnote omitted).

The import of the Board's order is to create an obligation to agree to the precise language of the expired jurisdiction-unit clause. Indeed, a more limited construction of the order cannot be squared with the conduct found below to have violated the Act—NPC's bare refusal to acquiesce in the Union's demand for verbatim renewal of the jurisdiction-unit clause of the expiring agreement. That order, while perhaps consistent with the Board's *per se* approach, is in conflict with the principles announced by this Court in *H. K. Porter*. The Board, by incorporating the jurisdiction-unit clause of the previous agreement into its bargaining order, impermissibly incorporated the substantive terms of that clause. This, *H. K. Porter* holds, is not a remedy which the Board may lawfully impose. Substantive terms and conditions of employment in a collective bargaining agreement provision may not, under the guise of a remedial order, be imposed on an employer. The presence of unit-defining terms in the same provision does not extend the Board's remedial authority. The court below thus decided a fundamental question of federal law in a way in conflict with an applicable decision of this Court; review should be granted to correct that error.

CONCLUSION

Newspaper publishing companies across the nation face the open-ended "traditional" jurisdiction-unit clause found in contracts negotiated with subordinate locals of the International Typographical Union during the hot metal era. As the computerized cold type technology comes on line, each of them must attempt to accommodate the interests of their composing room employees, who have

chosen one union to represent them, and those of their editorial and advertising department employees, who have not. Prior to the decision below, other courts of appeal had addressed the impact of automation on unit boundaries, delineating the respective bargaining obligations of employer and union consistent with the core policies of the Act. The conflicting decision below, however, injects confusion and uncertainty into this sensitive area of labor relations. A writ of certiorari should issue to settle this recurring and important question of federal labor law.

The court below compounded its unprecedented substantive analysis by refusing to confine the Board's remedial powers within the limits announced by this Court. A writ of certiorari should issue to conform the judgment below with the teachings of this Court.

Dated: October 1980

Respectfully submitted,

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80-698

No. ——

Supreme Court, U. S.
FILED
OCT 29 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEWSPAPER PRINTING CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

—and—

TULSA TYPOGRAPHICAL UNION, LOCAL NO. 403,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. 77-1796

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NEWSPAPER PRINTING CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

TULSA TYPOGRAPHICAL UNION, LOCAL NO. 403,
INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO,
Intervenor.

Decided May 19, 1980

Argued March 13, 1979

Rehearing and Rehearing In Banc
Denied Sept. 8, 1980

Lynn P. Mattson, Atty., Tulsa, Okl. (Charles A. Kothe of Kothe, Nichols & Wolfe, Inc., and Byron V. Boone of Boone, Ellison & Smith, Tulsa, Okl., were on the brief), for petitioner.

Janet C. McCaa, Atty., N.L.R.B., Washington, D.C. (Peter M. Bernstein and Marion L. Griffin, Attys., John S. Irving, Gen. Counsel, John E. Higgins, Jr., Deputy Gen. Counsel, Robert E. Allen, Acting Associate Gen. Counsel, Elliott Moore, Deputy Associate Gen. Counsel, N.L.R.B., Washington, D.C., were on the brief), for respondent.

Samuel C. McKnight, Detroit, Mich. (Sheldon L. Klimist of Miller, Klimist, Cohen, Martens, & Sugerman, P. C., Detroit, Mich., was on the brief), for intervenor.

Before SETH, Chief Judge, MARKEY*, Judge, and HOLLOWAY, Circuit Judge.

HOLLOWAY, Circuit Judge.

Petitioner, Newspaper Printing Corporation ("NPC"), seeks to set aside and/or modify a decision and order of the National Labor Relations Board, reported at 232 NLRB No. 42 (1977), which modified an earlier ruling by an Administrative Law Judge ("ALJ"), and found that petitioner had violated § 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) and (1) (1976). Tulsa Typographical Union No. 403, ITU, AFL-CIO (herein "Union") intervened with respect to NPC's petition. The Board filed a cross-application for enforcement of its order pursuant to § 10(e) of the Act, 29 U.S.C. § 160(e) (1976).

I

The factual background

NPC is an Oklahoma corporation engaged in the printing, sale and distribution of daily newspapers in Tulsa, Oklahoma, where its principal place of business is located. As agent for two competing daily newspaper publishers, NPC is responsible for the printing, solicitation of advertising, production and distribution of both the Tulsa Tribune and Tulsa World. The Union has represented NPC's composing room employees since 1950.[1]

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* Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

[1] The "composing room" actually comprises five separate rooms on the third floor of NPC's building. (R. 2043 n.5). The most recently expired collective-bargaining agreement between the parties, which ran from February 1, 1973, to January 31, 1976, described the unit as follows:

> SEC. 3. Jurisdiction of the Union and the appropirate unit for collective bargaining is defined as including all composing

NPC also maintains a collective-bargaining relationship with six other unions.

In September 1975 Robert L. Melton, president of the Union, informed Kenneth Fleming, NPC's vice president and general manager, that their current contract was due to expire on January 31, 1976, and requested that negotiations begin immediately for a new collective-bargaining agreement. Fleming replied that any agreement, conditions of employment or other understanding then in effect would terminate as of the date of the expiration of the contract, and offered to bargain for a new agreement.[2]

Negotiations commenced on November 11, 1975, at which time the Union presented its contract proposal. However, discussion at that meeting as well as at a second meeting on December 17, 1975, focused on major technological changes then being considered which the company announced it intended to implement during the life of the new agreement. The changes included replacement of the traditional "hot type" process in the composing room with a new computerized "cold type" process which would result in extensive elimination of unit work and a reduction in the number of unit employees. (R. 2044 n.6).[3]

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room work and includes classifications such as hand compositors, typesetting machine operators, makeup men, bank men, proofpress operators, proofreaders, machinists for typesetting machines. . . .

(R. 2040 n.1).

[2] The Administrative Law Judge found that the language used by Fleming was substantially similar to that utilized by the Union in two previous contract termination/reopening notices to the company, and that it was chosen in order to assure that the expiring contract would be completely open to negotiations. (R. 2041 n.2).

[3] Under the "hot type" process, hard copy or typewritten material is set from the newsroom or classified ad room to the composing

Fleming also indicated that because of the introduction of the new technology NPC was desirous of negotiating major changes in the Union's jurisdiction over particular work. In particular, in view of the significant investment the company would be making in new machinery and processes NPC wanted complete flexibility in assigning jobs, in placing the new equipment and determining who would operate it. The Union expressed concern with the new technology's effect on the bargaining unit, the extent of potential job displacement, and the right of unit employees to operate the new equipment. Fleming attempted to allay these fears by again advising the Union, as he had previously done between the first two meetings, that the conversion to new equipment and processes would not take place instantaneously, but rather would be gradually implemented in phases.[4]

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room. Bargaining unit employees then cut, distribute, retype or rekeyboard the hard copy in preparation for further phototypesetting or linotype operations. With respect to the latter, a keyboard device is used to transfer the copy to perforated paper tape. The tape is then inserted into a linotype machine which produces traditional lead type for use in publication. (R. 2043-44). *See also, Omaha Typographical Union, No. 190* v. *N.L.R.B.*, 545 F.2d 1138, 1140 n.1 (8th Cir.).

In *N.L.R.B.* v. *Columbia Tribune Publishing Co.*, 495 F.2d 1384, 1386 (8th Cir.) the "cold type" process was described as follows:

> "Cold type" is a process by which type is prepared by simply pasting printed material on a mat which in turn is photographed in a manner that transfers the image to a metal plate which when exposed to acid is etched into a finished plate ready for the pressroom. The cold type process eliminates the highly complicated linotype procedure. Consequently, it does not require any of the skilled labor necessary to the hot metal process.

[4] The first phase, which was to be completed by September, 1976, entailed the total conversion of the composing room to "cold type." (Apparently, some phototypesetting equipment had previously been introduced into the composing room). The second phase envisioned installation of a large and complex general-purpose computer sys-

The parties met for the third time on January 14, 1976, and discussion of these matters continued. Fleming attempted to respond to the Union's formal request for information regarding the new technology which he had received on or about January 7. At this meeting Fleming presented NPC's proposed extensive jurisdiction-unit language changes which are essentially expressed in the first paragraph:

> The jurisdiction of the Union and the appropriate unit for collective bargaining is defined as including only those employees engaged in all work which the Employer may from time to time designate to be performed in the Composing room. It is the express intention of the Employer to accomplish his complete production needs in the manner which he determines to be the most effective and economical method to fulfill the work requirements.

(R. 2050, 2077). Fleming suggested that because the language had been necessitated by the nature of the planned technological changes, it differed considerably from the historic contract language and that the Union would probably want to carefully examine the language before responding. Union negotiator Jobe agreed that this would be advisable, and the parties agreed to meet again the following week.

At the fourth meeting on January 21, 1976, the Union inquired whether NPC had considered or would consider

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tem which would be used in conjunction with phototypesetting work and also for billing and other business purposes. Lastly, both the newsroom and classified advertising room would be connected to the computer system by means of video display terminals. This would enable newspaper copy (ads or news articles) to be electronically transmitted directly from the newsroom and classified ad room terminals to the general purpose computer for storage and recall. The estimated time of completion of the latter two phases was May, 1977, and August 1, 1977, respectively.

proposing a guaranteed number of jobs in the composing room throughout the term of the agreement. Fleming replied that he would be happy to negotiate along these lines. At one point in the meeting Union negotiator Jobe stated that the Union had studied NPC's proposed unit jurisdiction clause, and that "there's no way in hell the Union could ever accept it, that to do so would be to kill the Union." Later in the meeting Union negotiator Melton observed that despite considerable discussion on all major issues, no progress was being made. Fleming stated that it looked as if the parties had reached or where about to reach an impasse. According to Fleming, Jobe then replied, "Hell, call it what you want, impasse, deadlock or whatever—we are, without question, locked up on this thing. We're not making any progress." (R. 2053).[5]

The parties met again on January 28, 1976. Fleming explained that NPC was not attempting to limit the Union's historic jurisdiction which would continue to be commensurate with the physical boundaries of the composing room, but merely wanted to update the jurisdic-

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[5] At the hearing before the Administrative Law Judge, Jobe categorically denied that either he or any member of the Union negotiating committee made any statement to the effect that an impasse had been reached or that the parties were deadlocked. (R. 101). However, the Administrative Law Judge credited Fleming's testimony, and found that Jobe and/or negotiator Melton made such statements at both the January 21, 1976 meeting and later meetings.

The ALJ's finding that Fleming was a highly credible witness was based on (1) his impression that Fleming had a vivid recollection of all of the negotiations (Fleming had made complete minutes of each bargaining session and referred to them during his testimony to refresh his recollection); (2) the fact that the record did not show that the minutes failed to support Fleming's testimony in various material respects; and (3) the fact that none of the various other members of the Union negotiating committee who attended the bargaining sessions were called as witnesses to corroborate Jobe's testimony. (R. 2053 n.12).

tional language in preparation for the new technology. He presented the Union with a letter in which the company requested to be notified on or before January 30 as to whether the Union would accept or reject NPC's proposal. The letter advised that if the Union did not accept the company's proposal by that date, the company wished to withdraw its proposals and submit a counter-proposal on February 1. The meeting ended with no progress being made on the jurisdictional issue, as did the next session the following day, January 29.[6]

Having received no communication from either the local or International Union[7] by February 2, on that day Fleming sent a letter to Melton which stated in part:

> In light of the fact that the contract with your Union expired by its terms and notification on January 31, 1976, and pending execution of a new agreement or a continuation of the existing impasse, no provisions, past practices or obligations that existed under the prior contract will be effective.
>
> We announce the following work relationships that will exist not as a contractual understanding but work practices as follows: . . . .

The letter went on to state that there would be no changes in wages or hours, but a number of unilateral

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[6] At the January 29 meeting the Union proposed that NPC guarantee 180 composing room jobs in 1976, and that the guaranteed figure be reduced by five each year until a minimum guarantee of 145 jobs resulted. Fleming replied that attrition alone would result in a more rapid reduction and suggested that the Union submit another proposal. Jobe replied that for internal union reasons, it would be better if NPC, rather than the Union, proposed to guarantee fewer jobs. (R. 2055-2056).

[7] Fleming raised questions about the authority of the Union negotiating committee at various times. As he had done repeatedly, shortly before expiration of the contract Fleming again asked that the committee request ITU assistance.

changes in working conditions were announced.[8] (R. 2057, 2079-80).

The parties met again on February 4, at which time Fleming explained that it had been necessary to institute the new rules and guidelines as he had not been advised that assistance from the ITU was forthcoming. He made it clear that the company wanted to continue to negotiate and reach an agreement on all issues. That afternoon ITU representative Boris attended the meeting, and thereafter became the chief negotiator for the Union. Boris requested that NPC withdraw the letter of February 2 and that the parties adhere to the terms of the old contract pending negotiation of a new agreement. Fleming replied that he did not regard the letter as constituting an impediment to continued negotiations and refused to rescind the letter. When Boris stated that NPC might be committing an unfair labor practice, Fleming declared that an impasse had been reached and the NPC was exercising its rights. (R. 2058).

Further negotiating sessions were held during the next seven months, but the parties were unable to reach an agreement. Although virtually all contract provisions were discussed during the course of these negotiations, the major efforts concerned the jurisdictional language. This was recognized as the overriding issue and it re-

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[8] Under the heading "Working Conditions," the letter in relevant part, stated that:

> It is the express intention of the Employer to accomplish his complete production needs in the manner which he determines to be the most effective and economical method to fulfill the work requirements.
>
> In this connection, Management shall exercise the right to cease any procedure or remove any equipment from the composing room, in the interest of efficiency.
>
> For details of the changes in working conditions see note 16, *infra*.

mained the primary obstacle to the negotiation of a new agreement. (R. 2059). Fleming asserted that the jurisdictional clause was designed to provide NPC with the necessary flexibility to operate most efficiently, particularly for the purpose of accommodating the changes that would be wrought by the new technology. NPC wanted the unequivocal right to both remove any work from the Union's jurisdiction, and to place new equipment and process in the composing room. (R. 2059). The Union took the position that NPC's demand for the right to unilaterally determine what work should remain in the composing room and thus within the Union's jurisdiction, and who should be in the unit, made it impossible for the Union to know for whom it was bargaining. (R. 2059).

On June 11 a federal mediator who had been assisting the parties declared that the negotiations were hopelessly deadlocked, citing the jurisdictional issue as the major area of disagreement. (R. 2060 and n.14). Negotiations ceased on August 26.

On these facts the Board accepted the finding of the ALJ that the parties reached a bargaining impasse on January 21, 1976, and that the principal cause of that impasse was their inability to resolve their jurisdictional differences. (R. 2069, 2093). Unlike the ALJ, however, the Board concluded that by insisting to the point of impasse on its proposed jurisdiction-unit clause, NPC had refused to bargain in good faith in violation of § 8(a)(5) of the Act.

The Board's reasoning was two-fold: (1) that the proposed clause would have given NPC unilateral control over the scope of the unit; and (2) that since the definition of an appropriate unit is not a mandatory subject of bargaining, NPC could not lawfully insist to impasse upon modification of the existing clause. (R. 2093-2095). Accordingly, the Board found that each of the unilateral changes instituted by NPC constituted a further § 8(a)

(5) violation since the company's insistence on its jurisdiction-unit proposal precluded a genuine impasse on the other issues. (R. 2095).

The Board's order directs NPC to cease and desist from the unfair labor practices found, to restore the employment conditions which were unilaterally changed, to make whole all employees for any losses they suffered as a result thereof, and to bargain in good faith with the Union as the representative of its employees in the appropriate unit as defined in the most recent collective-bargaining agreement. (R. 2096-2097). The company petitions for review of the order and the Board cross-petitions for enforcement, which the intervenor supports.

II

The jurisdiction-unit clause

A

The Board's finding on the wording of this clause

The complaint alleged, *inter alia*, that NPC violated § 8(a)(5) of the Act by insisting upon contractual language which failed to sufficiently identify or define the appropriate unit. (R. 2023, ¶ 14). The ALJ analyzed the clause by dissecting it into three component parts: (1) definition of the appropriate unit; (2) union jurisdiction; and (3) management rights. In finding that the clause clearly described the appropriate unit, the ALJ excised the management rights language allowing NPC to determine the work that was to be performed in the composing room so that it read as follows: "The . . . appropriate unit for collective bargaining is defined as including only those employees engaged in all work . . . in the Composing Room." (R. 2061 n.15). Although recognizing that the proposed language, even when doctored, represented a departure from the unit definition then

existing and historically recognized by the parties, the ALJ deemed this to be a "clarifying change" upon which NPC had a right to insist. (R. 2062-2063).[9]

The Board disagreed with both the analysis of the ALJ and his legal conclusions. The Board reasoned that the deleted language was an integral part of the unit definition because it enabled NPC to unilaterally determine who was to be in the unit at will. The Board stated that it "does not certify as appropriate a unit where one party has unilateral control over unit scope." (R. 2094). The Board found the instant situation to be similar to that presented in *Columbia Tribune Publishing Co.*, 201 N.L.R.B. 538, enforced and remanded, 495 F.2d 1384 (8th Cir.), where an employer's refusal to incorporate into any agreement a description of the appropriate bargaining unit was deemed a failure to bargain in good faith.

In challenging the Board's rulings, NPC argues that it merely sought to clarify the unit description, that its proposed language at no time put into question the Union's right to represent the unit, and that the Board erred in equating its conduct with the employer's total

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[9] Historically, the collective-bargaining agreements between the parties defined the appropriate unit in terms of "all composing room work", followed by a detailed, open-ended listing of job classifications and descriptions. *See* note 1, *supra*. This left room for the contention that the unit included employees performing work beyond the physical confines of the composing room. Conversely, NPC's proposed language defined the unit in terms of employees performing work "in the composing room."

The ALJ concluded that this was merely a "clarifying change," after finding that: (1) there was no evidence or showing that the employees performing work beyond the boundaries of the composing room had ever been included in the unit; (2) the practical effect of NPC's language was merely to carefully delimit the unit in accordance with the parties' historical working relationship; and (3) most importantly, no employees would be disenfranchised as a result of the proposed language. (R. 2062).

failure to accept a jurisdiction-unit clause in *Columbia Tribune.*

Section 9(b) of the Act directs the Board to determine the appropriate unit in each case "in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the Act]." 29 U.S.C. § 159(b). Determination of the appropriate unit is largely within the Board's discretion "whose decision, 'if not final, is rarely to be disturbed' . . . ." *South Prairie Construction Co.* v. *Local No. 627, Int'l Union of Operating Engineers, AFL-CIO*, 425 U.S. 800, 805, 96 S.Ct. 1842, 1845, 48 L.Ed.2d 382 (per curiam). Moreover, it is clear that "neither the Board's discretion under section 9(b), nor the employees' right of self-determination under section 7, can be limited by contract between a union and employer." *Sheraton-Kauai Corp.* v. *N.L.R.B.*, 429 F.2d 1352, 1357 (9th Cir.). Applying these principles, we conclude that we should not disturb the Board's judgment here that the unit description accords one party unilateral control over unit scope and is inherently inappropriate. (R. 2094).[10]

B

The finding of a § 8(a)(5) violation by NPC's insistence to impasse on the jurisdiction-unit clause

As stated, the Board found the company's insistence to impasse on modification of the existing clause to be an independent violation of § 8(a)(5) of the Act. NPC attacks this finding for two reasons. First, the company claims that the ALJ specifically found that the proposed

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[10] The Board found that the traditional composing room unit described in note 1, *supra* was appropriate for purposes of collective-bargaining, and that the conversion from "hot" to "cold" type affected neither the appropriateness of the unit, nor the Union's representative status. (R. 2094 n.3).

language was designed to preserve the unit and would not result in the disenfranchisement of any unit employee.[11] Second, NPC argues that the Board has erroneously equated its attempt to retain managerial control over the physical placement of equipment and assignment of work with a plan to control the scope of the unit. The company says that bargaining units are composed of people, not work, and argues that the Board's exclusive authority to determine the appropriate unit under § 9(b) should not be construed as precluding management from seeking the contractual right to transfer work out of the unit as its economic needs dictate, as this is a mandatory subject within § 8(d) of the Act, 29 U.S.C. § 158(d). Accordingly, the Board's reliance on representation cases involving a direct frontal attack on the scope of the unit is said to be misplaced.

The ALJ recognized that it may be argued that NPC's "insistence upon a more restrictive unit clause constitutes a deviation from the longstanding jurisdiction-unit description as recognized by the parties. . . ."; nevertheless the ALJ concluded that the practical effect of the change was to delimit the unit more carefully, consistent with the realities of the working relationship, and that NPC's insistence on the clause was not unlawful conduct. (R. 2062-63). The Board essentially adopted the subsidiary findings of the ALJ but made different ultimate findings and conclusions that violations of the Act had occurred. This was within the Board's prerogative, for it is well established that it is the Board's duty to make the final determination as to whether an unfair labor practice has occurred. *M.S.P. Industries, Inc.* v. *N.L.R.B.*, 568 F.2d 166, 177 (10th Cir.); *Groendyke Transport, Inc.* v.

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[11] These findings appear to be contradictory to the ALJ's previous finding that implementation of the technological changes sought by the company would result in extensive elimination of unit work and a reduction in the number of unit employees. (R. 2044 n.6).

N.L.R.B., 530 F.2d 137, 139 (10th Cir.). We cannot say that the Board erred in finding that the proposed language modified the existing unit description.[12]

We cannot find support in the cases for NPC's conduct in insisting to impasse on altering the existing contractual unit description.[13] Insistence on a modification in the scope of the bargaining unit, whether established by Board certification or voluntary recognition, is an unfair labor practice in violation of § 8(a)(5) of the Act. *Newport News Shipbuilding & Dry Dock Co.* v. *N.L.R.B.*, 602 F.2d 73, 76 (4th Cir.); *Hess Oil & Chemical Corp.* v. *N.L.R.B.*, 415 F.2d 440, 445 (5th Cir.), *cert. denied*, 397 U.S. 916, 90 S.Ct. 920, 25 L.Ed.2d 97; *accord, Douds* v. *International Longshoremen's Association*, 241 F.2d 278, 282-83 (2d Cir.). The reason is that § 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees and § 9(a) obligates the employer to recognize the union as the exclusive representative of all the employees in the appropriate unit. *Newport News, supra* at 76. *See also, N.L.R.B.* v. *Southland Cork Co.*, 342 F.2d 702, 706 (4th Cir.).

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[12] NPC claims that the Board overlooked undisputed evidence that it offered to guarantee a minimum of 125 jobs to unit employees, which is said to be considerably more than the Union had requested. We think this evidence was properly ignored because the proposal was not made until June, 1976, some four months after the company committed its unfair labor practice here. Moreover, the proposal would have permitted NPC to reduce the 180 unit jobs (R. 2055) to 75 the following year. (R. 1362, 1368, GCX 31 § 38).

[13] We find no merit in NPC's contention that its conduct was devoid of anti-union animus and that any control it might have secured over unit scope would have been an unintended by-product of its pursuit of legitimate business objectives. Good faith is no defense to a refusal to bargain charge where such refusal constitutes insistence to impasse on a non-mandatory subject. *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349, 78 S.Ct. 718, 722, 2 L.Ed.2d 823.

Accordingly, it has been said that "there [can] be no genuine bargaining as contemplated by the Statute until complete recognition [has] been granted as the Act requires," *McQuay-Norris Mfg. Co.* v. *N.L.R.B.*, 116 F.2d 748, 751 (7th Cir.), *cert. denied*, 313 U.S. 565, 61 S.Ct. 843, 85 L.Ed. 1524, and that "[t]he parties cannot bargain meaningfully about wages or hours or conditions of employment unless they know the unit of bargaining." *Douds, supra* at 282. Moreover it is equally well established that insistence to impasse upon a non-mandatory subject of bargaining violates § 8(a)(5). *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp., supra*, 356 U.S. at 349, 78 S.Ct. at 722. And the description or size of the bargaining unit is not a mandatory subject. *See, e.g., Newport News Shipbuilding & Dry Dock Co.* v. *N.L.R.B., supra* at 76; *National Fresh Fruit & Vegetable Co.* v. *N.L.R.B.*, 565 F.2d 1331, 1334 (5th Cir.).[14]

It is true, as NPC contends, that the transfer of work out of the bargaining unit is a mandatory subject of collective-bargaining. *See, University of Chicago* v. *N.L.R.B.*, 514 F.2d 942, 949 (7th Cir.); *accord, Boeing Co.* v. *N.L.R.B.*, 581 F.2d 793, 797 (9th Cir.). It is

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[14] The Fifth Circuit's decision in *Newspaper Production Co.* v. *N.L.R.B.*, 503 F.2d 821 (5th Cir.), lends no support to the position asserted by the company here. The court there expressly declined to impugn the general rule that "insistence to the point of impasse on restriction or expansion of the bargaining unit is an unfair labor practice." *Id.* at 828 (citations omitted). Rather, in upholding the Board's determination that the Union was entitled to insist to impasse on expansion of the unit, the court found the rule inapplicable because: (1) the union, which already represented the employer's eight to eleven photoengravers, was selected to represent a new group of three production workers; (2) the expiring contract between the parties provided for inclusion of such a new group of employees in the contract; and (3) the combined unit was concededly appropriate. *Id.* at 824, 828-29. It should be clear that no comparable circumstances are present here to warrant an exception to the general rule.

equally clear that the effect of automation on the bargaining unit is a mandatory subject. *Omaha Typographical Union, No. 190* v. *N.L.R.B.*, 545 F.2d 1138, 1141 (8th Cir.); *N.L.R.B.* v. *Columbia Tribune Publishing Co.*, supra at 1391. However, unlike the employer in *Omaha Typographical*, NPC was not content with the right to bargain hard to a genuine impasse and thereafter to implement its proposed technological changes. Rather, in demanding the right to transfer work out of the unit at will, NPC sought to circumvent the Union's right to represent the employees in the composing room unit.

The Union's right to recognition in the appropriate unit, as defined in the collective-bargaining agreement, makes the right to bargain over either of these issues effective. To allow an employer to alter the composition of the unit at will by unilaterally electing to transfer work out of the unit would effectively deprive unit employees of their statutory right to collective representation and bargaining as to the reduction or elimination of their jobs through work transfers or automation. The employer's unilateral action would place those jobs beyond the scope of the unit represented by the Union. The Fourth Circuit in *Newport News Shipbuilding & Dry Dock Co.* v. *N.L.R.B.*, *supra*, 602 F.2d at 77-78,[15] rejected

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[15] NPC argues that *Newport News* is distinguishable from the instant case because: (1) there the employer's proposal would have disenfranchised a significant number of employees from union representation; and (2) the decision turned upon an administrative law judge's findings that the employer intended to reduce the size of the unit. We cannot agree.

In *Newport News* the employer sought to change the unit description by substituting "designers" with "draftsmen," thereby eliminating from the unit employees falling within the former classification, but not the latter. Here, NPC sought to eliminate all job classifications which would have denied union representation to employees in all unit job classifications whose work NPC did not designate to be performed in the "Composing Room." As stated,

an argument virtually identical to the one advanced by NPC here:

> The Company argues strenuously that the substitute language was not intended to modify the unit certified by the Board but to clarify the various job functions which the members of the unit were to perform. The Board agrees that, unless transfers are specifically prohibited by the relevant collective bargaining agreement, an employer may transfer work out of the bargaining unit, as long as the employer first bargains in good faith and is not motivated by anti-union animus. *See University of Chicago* v. *N.L.R.B.*, 514 F.2d 942, 949 (7 Cir. 1975); *accord, Boeing Co.* v. *N.L.R.B.*, 581 F.2d 793, 797 (9 Cir. 1978). It does not follow however, that an employer, under the guise of the transfer of unit work, may alter the composition of the bargaining unit. To do so would not only modify the job functions of the various unit members but also affect their right to representation. Thus, implicit in the requirement that the employer bargain in good faith before changing unit work is the assumption that the affected members of the unit will be represented.

Finally, NPC contends that the Union was attempting to expand the unit description, and that both parties viewed their respective contract proposals as mandatory. Thus, assuming arguendo that the clause is non-manda-

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note 11, *supra*, the ALJ found that implementation of the new technology would result in extensive elimination of unit jobs.

In addition, NPC's suggestion that the holding in *Newport News* rested on a finding of anti-union animus is clearly incorrect. The ALJ there expressly found (p. 13) that the employer's insistence on alteration of the unit "was primarily motivated by an economic desire to make the shipyard more efficient by eliminating some of the classifications and job functions in that unit and allowing them to be performed elsewhere . . . ." 236 NLRB No. 218.

tory, the Union was equally culpable, therefore the company should not be held responsible. We cannot agree.

The proposed agreement which the Union presented at the first meeting between the parties on November 11, 1975, left the existing unit description intact (GCX 8, Sec. 3). The record discloses that the Union resisted to impasse NPC's proposed language on the grounds that it would destroy the unit, and that the company was making it impossible for the Union to determine for whom it was bargaining. (R. 2059). Moreover, both the Administrative Law Judge and the Board agreed that NPC's proposed jurisdiction-unit clause had precipitated the bargaining impasse on January 21, 1976. (R. 2093, 2069-70, 2059-60). Finally, even assuming the Union was seeking to alter the unit, such conduct is not a defense to the charge against NPC. *Newport News Dry Dock & Shipbuilding Co.* v. *N.L.R.B., supra,* at 78.

In sum, we sustain the Board's finding that the company refused to bargain in violation of § 8(a)(5) by its insistence to impasse on inclusion of its jurisdiction-unit clause.

III

The Board's order

The Board's order directs the company, *inter alia,* to restore all employment conditions and practices which it unilaterally changed and to bargain in good faith with the union as the exclusive representative of its employees in the appropriate unit as defined in the most recent collective-bargaining agreement. (R. 2096-97). NPC attacks the order on the grounds that it: (1) forces the parties to agree to a substantive contract term dealing with the placement of work in violation of the principles announced in *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99, 90 S.Ct. 821, 25 L.Ed.2d 146; (2) is excessive in that it requires a rollback of all unilateral change without

demonstrating how discussion of the jurisdiction-unit clause tainted impasse over the other subjects; and (3) is punitive because it renders the company's huge capital investment a nullity. We must disagree.

First, NPC's contention that it is being forced to agree to substantive contractual terms is unpersuasive. Nowhere in its order does the Board attempt to compel agreement on work placement or any other subject. On the contrary, the order directs the company to engage in good faith bargaining in the unit the company sought to alter and expressly provides that "*if an understanding is reached,* [to] embody such understanding in a signed agreement." (R. 2097, ¶ 2(b)) (Emphasis added). We have previously observed that *H. K. Porter, supra* "does not impinge on the vitality of the Borg-Warner rule," which upheld the "Board's authority to require a party to sign a contract, agreed upon except as to nonmandatory bargaining subjects," nor does it affect the validity of the Board's remedial orders for violations of that rule. *N.L.R.B.* v. *Central Machine & Tool Company,* 429 F.2d 1127, 1129 (10th Cir.), *cert. denied,* 401 U.S. 909, 91 S.Ct. 870, 27 L.Ed.2d 807.

Second, NPC's contention that the Board's order is excessive is untenable. As noted, after bargaining to impasse on its proposed jurisdiction-unit language the company announced the institution of a number of unilateral changes in working conditions.[16] The Board found that

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[16] The changes in question were as follows: (1) NPC reserved the right, in the interest of efficiency, to cease any procedure or remove any equipment from the composing room; (2) no duplication of work was to be performed between departments or employees, and NPC reserved the right to determine who would perform the work in the event this occurred; (3) no provisions of the ITU general laws, rules or bylaws would be considered applicable to NPC's work relationships; (4) the Standing Committee was abolished, and although any cases of discipline and discharge arising would continue to be handled through a grievance pro-

these unilateral changes were independent violations of § 8(a)(5) and ordered a "rollback" on all of these changes. The company argues that at most there was a failure to agree on one of these items (Brief of NPC at 40), and that the Board's order was clearly excessive. We sustain the Board's finding that each of the unilateral changes implemented by the company constituted independent violations of § 8(a)(5) and its remedial order directed to these violations.

Only a genuine impasse, one not caused by the failure of one of the parties to bargain in good faith, permits an employer to take unilateral action on a mandatory subject without violating the Act. *United Fire Proof Warehouse Co.* v. *N.L.R.B.*, 356 F.2d 494, 497 (7th Cir.). *Accord, N.L.R.B.* v. *Pacific Grinding Wheel Co., Inc.*, 572 F.2d 1343, 1349 (9th Cir.). No such genuine impasse was possible here for, as the Board found, the

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cedure identical with prior customs, there was to be no arbitration except by mutual agreement; (5) the priority system would only apply to increases or decreases in the work force; competency to perform the job would be determinative. Situations would be staffed and all placements handled exclusively by NPC with competency as the highest criterion for selection and retention; (6) the holding of chapel meetings on company property was prohibited; (7) NPC would not make deductions for any pension plan, but would include an amount equal to $.50/shift (maximum weekly amount $2.50) in each employee's check; (8) only reproduction work required by NPC would be allowed; (9) any full-time regular employee required to serve on jury duty during his normal scheduled working hours would be reimbursed for an amount equal to the difference between the pay received by the court and the pay scale of the employee, and (10) the Joint Apprenticeship Committee was abolished. (R. 2079-80).

The ALJ found that NPC's elimination of chapel meetings on company premises, and the abolition of the Joint Apprenticeship Committee violated § 8(a)(5) of the Act. (R. 2071-2074). NPC did not file exceptions to the ALJ's decision. Accordingly, these two violations found are not contestable here under § 10(e) of the Act.

parties acknowledged that the unit jurisdiction clause predominated in the negotiations and was the principal cause of the failure to reach an agreement. (R. 2095).[17] NPC's insistence here on its new version of a jurisdiction-unit clause was in effect a refusal to bargain in good faith which "precluded a genuine impasse on the other issues." (R. 2095). Hence the unilateral changes implemented were themselves independent § 8(a)(5) violations. (R. 2095). *N.L.R.B.* v. *Katz*, 369 U.S. 736, 743, 82 S.Ct. 1107, 1111, 8 L.Ed.2d 230; *N.L.R.B.* v. *United Nuclear Corp.*, 381 F.2d 972, 976 (10th Cir.). We feel that the order directing abrogation of the unilaterally altered terms or conditions of employment and restoration of the *status quo ante* was within the Board's remedial discretion under § 10(c) of the Act. *See, Fibreboard Corp.* v. *N.L.R.B.*, 379 U.S. 203, 215-16, 85 S.Ct. 398, 405-406, 13 L.Ed.2d 233. In *N.L.R.B.* v. *King Radio Corporation*, 416 F.2d 569, 573 (10th Cir.), *cert. denied* 397 U.S. 1007, 90 S.Ct. 1234, 25 L.Ed.2d 420, we observed that:

> The primary responsibility for the formulation of a remedy rests with the Board, and this court will not strike down a proposed remedy, unless it can be said to be oppressive and not designed to effectuate the policies of the Act. *N.L.R.B.* v. *General Drivers, Chauffeurs, Helpers, Etc.*, 264 F.2d 21 (10th Cir.).

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[17] The ALJ had found that the parties reached an impasse on other issues in addition to the jurisdiction-unit clause. (R. 2070, 2074), and that certain unilateral changes were reasonably comprehended within NPC's pre-impasse proposals and were therefore lawful. (R. 2071-2074).

The Board said the ALJ's finding was "at best tenuous," but concluded that it was unnecessary to resolve the issue. (R. 2095). The Board stated that the jurisdiction-unit clause was always the focus of discussion and was acknowledged by the parties to be the main obstacle to agreement and that "Respondent's insistence on its jurisdiction-unit proposal, which we have found to be a refusal to bargain in good faith, precluded a genuine impasse on the other issues." (*Id.* at 2095).

> It is the function of the Board, not the judiciary, to determine how the effect of an unfair labor practice may be expunged. *Furr's Inc.* v. *N.L.R.B.*, 381 F.2d 562 (10th Cir.). Cert. denied 389 U.S. 840, 88 S.Ct. 70, 19 L.Ed.2d 105.

We do not feel that our opinion in *N.L.R.B.* v. *Process & Pollution Control Co.*, 588 F.2d 786 (10th Cir.) supports the company's position here. In finding a Board order overly broad there we stated that the Board is without authority to enjoin all violations of the Act merely because one violation is found. *Id.* at 792. Rather, "to justify restraint of other violations, it must appear that they bear some resemblance to that which the employer has committed, or that danger of their commission is to be anticipated from the course of his conduct in the past." *Id.* Here, by contrast, the Board found that each of the unilateral changes implemented by NPC constituted an independent violation of the duty to bargain. (R. 2095). Moreover those independent violations occurred after the impasse developed on the jurisdiction-unit clause. Under these circumstances we cannot say that the Board's order is excessive.

Finally, the remedial relief ordered by the Board here is not shown to be economically prohibitive or punitive. NPC failed to proffer evidence that its capital investment will now be wasted. Nothing in the Board's order purports to impede the company's planned conversion from "hot" to "cold" type. Rather, the order merely directs that in implementing the technological changes the company accord the Union its rightful recognition as the representative of all employees in the appropriate unit. We think the Board properly exercised its remedial discretion under § 10(c).

Accordingly, the petition to review and set aside the Board's order is denied and the order will be

ENFORCED.

Cases 16-CA-6463 and 16-CA-6669

NEWSPAPER PRINTING CORPORATION

and

TULSA TYPOGRAPHICAL LOCAL NO. 403

September 23, 1977

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

On April 25, 1977, Administrative Law Judge Gerald A. Wacknov issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Union filed exceptions and supporting briefs, and Respondent filed answering briefs to both the General Counsel and the Union.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The complaint alleged that Respondent violated Section 8(a)(5) and (1) by refusing to agree upon contract language defining the appropriate unit and by unilaterally instituting changes in the absence of a bargaining impasse or not encompassed in its preimpasse bargaining proposals.[1] The Administrative Law Judge found that Re-

[1] The complaint further alleged that Respondent violated Sec. 8(a)(1) by threatening an employee with discharge if he failed

spondent's proposed unit-jurisdiction clause sufficiently identified the unit, that Respondent lawfully could insist to impasse on that clause, and that certain unilateral changes were within the scope of the preimpasse proposals. He further found two unilateral changes to be outside the scope of preimpasse bargaining and therefore to have violated the Act.

The General Counsel and Union except, *inter alia*, to the Administrative Law Judge's finding that insistence on the unit-jurisdiction clause did not violate Section 8(a)(5), to his failure to find that all of the unilateral changes were unlawful, and to his failure to recommend a bargaining order. We find merit in these exceptions.

The principal cause of the January 21 impasse was Respondent's jurisdiction-unit proposal, which included the following language:

> The jurisdiction of the Union and the appropriate unit for collective bargaining is defined as including only those employees engaged in all work *which the Employer may from time to time designate* to be performed in the Composing Room. It is the express intention of the Employer to accomplish his complete production needs in the manner which he determines to be the most effective and economical method to fulfill the work requirements. [Emphasis supplied.]

The Administrative Law Judge analyzed the clause by separating it into three components—definition of the appropriate unit, jurisdiction, and management rights. By this method, he eliminated the management-rights language allowing Respondent to determine who is in the unit to produce a unit definition as follows: "The . . .

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to comply with a unilateral change in work rules. The Administrative Law Judge dismissed that allegation. In the absence of exceptions, we adopt the dismissal of that allegation *pro forma*.

appropriate unit for collective bargaining is defined as including only those employees engaged in all work . . . in the Composing Room." Although he recognized that even this doctored version of the clause represented a modification of the existing unit definition, he found it to be a "clarifying change" and therefore within Respondent's rights.

We disagree with both the method of analysis and the legal conclusions. Respondent's proposed jurisdiction-unit clause cannot properly be analyzed by removing the management-rights language. That language is an integral part of the unit definition in that it allows Respondent unilaterally to determine who is in the unit at any given time. The Board does not certify as appropriate a unit where one party has unilateral control over unit scope.

Contrary to the Administrative Law Judge's analysis, the holding in *Columbia Tribune* [2] is fully applicable here. In *Columbia Tribune*, as here, the jurisdiction-unit clause was the major obstacle to agreement in negotiations. The respondent there was found to have precluded good-faith bargaining by refusing to include the traditional jurisdiction-unit clause of prior contracts; both its asserted need for flexibility in changing from hot to cold type and the fact that jurisdiction and unit definition were combined in one clause [3] were rejected as defenses.

The *Columbia Tribune* case cannot be distinguished, as did the Administrative Law Judge, on the basis that the

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[2] *Columbia Tribune Publishing Co.*, 201 NLRB 538 (1973).

[3] As in *Columbia Tribune*, we find the traditional composing room unit as set out in fn. 1 of the Administrative Law Judge's Decision to be appropriate for the purposes of collective bargaining and further find that neither the appropriateness of the unit nor the Union's representative status is affected by the change from hot to cold type.

Respondent there refused to accept any unit clause. The jurisdiction-unit clause proposed by Respondent here, when properly analyzed as a whole, is tantamount to a refusal to include a unit definition because Respondent retains unfettered discretion to redefine the unit at any time. By insisting on such a clause, Respondent has, like the respondent in *Columbia Tribune*, failed to fulfill its statutory obligation to bargain in good faith.

Moreover, even if the proposed unit-jurisdiction clause did not contain this fatal flaw, as the definition of an existing appropriate unit is not a mandatory subject of bargaining, Respondent cannot lawfully insist to impasse on a modification of the existing clause.[4] Consequently, we find Respondent's insistence on its proposed jurisdiction-unit clause to be a refusal to bargain in good faith in violation of Section 8(a)(5) of the Act.

The Administrative Law Judge found that the parties reached impasse on other items in addition to the jurisdiction-unit clause. Although his finding concerning impasse on these other items is at best tenuous, we find it unnecessary to resolve that issue. We do note, however, that discussion of these other issues continued in bargaining sessions after January 21. The jurisdiction-unit clause was always the focus of discussion and was acknowledged by the parties to be the main obstacle to agreement. Respondent's insistence on its jurisdiction-unit proposal, which we have found to be a refusal to bargain in good faith, precluded a genuine impasse on the other issues. As stated in *Douds* v. *International Longshoremen's Association* [*N.Y. Shipping Assn.*], 241 F.2d 278, 282 (C.A. 2, 1957), "Parties cannot bargain meaningfully about wages or hours or conditions of employment unless they know the unit for bargaining."

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[4] *McQuay-Norris Manufacturing Company* v. *N.L.R.B.*, 116 F.2d 748 (C.A. 7, 1940).

Therefore, each of the unilateral changes instituted on that date is a further violation of Section 8(a)(5) of the Act. Accordingly, we shall order Respondent to rescind the unilateral changes, make the employees whole for any losses they have suffered because of Respondent's unlawful acts, plus interest as prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*,[5] and bargain upon request with the Union.

ORDER

Pursuant to Section 10(b) of the National Labor Relations Act, as amended, the National Labor Relations Board orders that the Respondent, Newspaper Printing Corporation, Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively in good faith with Tulsa Typographical Union Local No. 403.

(b) Unilaterally changing terms and conditions of employment, including preexisting practices regarding chapel meetings on company premises, priority hiring, substitute hiring, jury duty, the I.T.U. general laws, reproduction, jurisdiction, management rights, the Joint Standing Committee, the Joint Apprenticeship Committee, and the I.T.U. negotiated pension plan.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

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[5] In accordance with our decision in *Florida Steel Corporation*, 231 NLRB 651 (1977); we shall apply the current 7-percent rate for periods prior to August 25, 1977, in which the "adjusted prime interest rate" as used by the Internal Revenue Service in calculating interest on tax payment was at least 7 percent.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Restore and abide by the preexisting practices regarding chapel meetings on company premises, priority hiring, substitute hiring, jury duty, the I.T.U. general laws, reproduction, jurisdiction, and management rights; reestablish and permit the functioning of the Joint Apprenticeship Committee and the Joint Standing Committee; and reinstitute the I.T.U. negotiated pension plan, as such matters were applied, operated, and interpreted under the collective-bargaining agreement, and as modified by collective bargaining subsequent to February 2, 1976, and make whole all unit employees for any losses they suffered due to the unilateral changes.

(b) Upon request bargain collectively in good faith with Tulsa Typographical Union Local No. 403, as the exclusive representative of its employees in the appropriate bargaining unit as defined in the most recent collective-bargaining agreement, with respect to wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Post at its Tulsa, Oklahoma, facility copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 16, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places within the composing room, including all

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all parties had the opportunity to present their evidence, the National Labor Relations Board has found that we committed certain unfair labor practices and has ordered us to post this notice. We intend to abide by the following:

WE WILL NOT refuse to bargain in good faith with Tulsa Typographical Union Local No. 403.

WE WILL NOT unilaterally change terms and conditions of employment, including preexisting practices regarding chapel meetings on company premises, priority hiring, substitute hiring, jury duty, the I.T.U. general laws, reproduction, jurisdiction, management rights, the Joint Standing Committee, the Joint Apprenticeship Committee, and the I.T.U. negotiated pension plan.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7 of the Act.

WE WILL restore and abide by the preexisting practices regarding chapel meetings on company

premises,. priority hiring, substitute hiring, jury duty, the I.T.U. general laws, reproduction, jurisdiction, and management rights; reestablish and permit the functioning of the Joint Apprenticeship Committee and the Joint Standing Committee; and reinstate the I.T.U. negotiated pension plan, as such matters were applied, operated, and interpreted under the collective-bargaining agreement, and as modified by collective bargaining subsequent to February 2, 1976, and make whole all unit employees for any losses they suffered due to the unilateral changes, with interest.

WE WILL, upon request, bargain collectively in good faith with Tulsa Typographical Union Local No. 403, as the exclusive representative of the employees in the appropriate unit as defined in the most recent collectiev-bargaining agreement, with respect to wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

NEWSPAPER PRINTING
CORPORATION

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Case Nos. 16-CA-6463
16-CA-6669

NEWSPAPER PRINTING CORPORATION

and

TULSA TYPOGRAPHICAL UNION LOCAL NO. 403

Billy R. Snow, Fort Worth, Texas for the General Counsel.

C. A. Kothe, of *Kothe, Nichols & Wolf, Inc.*, Tulsa, Okla., for the Respondent.

John Keefer, of *Jarboe, Keefer & Barrow*, Tulsa, Okla.; and *Shelton L. Klimist*, of *Miller, Klimist, Cohen, Martens & Sugerman, P.C.*, of Detroit, Mich., for the Charging Party.

DECISION

Statement of the Case

GERALD A. WACKNOV, Administrative Law Judge: Pursuant to notice, a hearing with respect to this matter was held before me in Tulsa, Oklahoma, on September 28 and 29, October 12, 13 and 14, and November 15, 16 and 17, 1976. The original charge in Case No. 16-CA-6463 was filed on February 18, 1976, by Tulsa Typographical Union Local No. 403 (herein called the Union), and a first amended charge was filed by the Union on March 31, 1976. Thereafter, on April 7, 1976, a complaint was issued alleging violations by Newspaper Printing Corporation (herein called Respondent) of Section

8(a)(5) and (1) of the National Labor Relations Act (herein called the Act). The charge in Case No. 16-CA-6669 was filed on June 28, 1976, by the Union, and alleges an additional Section 8(a)(5) violation. Thereafter, on August 12, 1976, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing was issued by the Acting Regional Director for the Sixteenth Region of the National Labor Relations Board (herein called the Board), the captioned cases being consolidated in order to effectuate the purposes of the Act, and to avoid unnecessary costs or delay. Respondents' answers, duly filed, deny the commission of any unfair labor practices.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel, Counsel for Respondent and Counsel for the Charging Party.

Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

Findings of Fact

I. Jurisdiction

Respondent is an Oklahoma corporation engaged in the printing, sale and distribution of daily newspapers, with its principal place of business located in Tulsa, Oklahoma. In the course and conduct of its business operations, Respondent annually receives gross revenues in excess of $500,000, and annually ships of distributes newspapers valued in excess of $50,000 directly to points outside the State of Oklahoma. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

It is admitted that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Issues*

The principal issues raised by the pleadings are:

1. Whether Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to agree upon contractual language describing the unit appropriate for purposes of collective bargaining, thus precluding the Union from engaging in meaningful collective-bargaining negotiations.

2. Whether Respondent, in violation of Section 8(a)(5) and (1) of the Act, unilaterally instituted changes relating to employees' wages, hours and working conditions, prior to having reached a bargaining impasse with the Union, and

3. Whether Respondent, in violation of Section 8(a)(5) and (1) of the Act, unilterally instituted changes relating to employees wages, hours and working conditions, not reasonably encompassed by its pre-impasse bargaining proposals.

B. *The Facts*

1. Background

The Respondent maintains its office, printing facilities and principal place of business in Tulsa, Oklahoma. It is agent for two competing daily newspaper publishers, the Tulsa Tribune Company and the World Publishing Company, publishers of the Tulsa Tribune, and Tulsa World, respectively; and is responsible for the printing,

solicitation of advertising, production and distribution of both newspapers. Respondent has maintained a collective-bargaining relationship with the Union, representative of Respondent's composing room employees, since 1905.[1] In

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[1] The combined unit-jurisdiction provisions contained in the most recently expired collective-bargaining agreement are, in pertinent part as follows:

JURISDICTION

SEC. 2. All work which this agreement recognizes to be within the jurisdiction of the Union shall be performed only by journeymen and apprentices. Apprentices may be employed only in accordance with the ratio of apprentices to journeymen provided elsewhere in this agreement.

SEC. 3. Jurisdiction of the Union and the approriate unit for collective bargaining is defined as including all composing room work and includes classifications such as hand compositors, typesetting machine operators, makeup men, bank men, proofpress operators, proofreaders, machinists for typesetting machines, operators and machinists on all devices which cast or compose type of slugs, or film, operators of tape perforating machines and recutter units for use in composing or producing type, operators of all phototypesetting machines (such as Fotosetter, Photon, Linofilm, Monophoto, Coxhead Liner, Filmotype, Typro and Hadego) and employees engaged in proofing, waxing and paste makeup with reproduction proofs, processing the product of phototypesetting machines, including development and waxing; paste makeup of all type, hand lettered, illustrative, border and decorative material constituting a part of the copy; ruling, photoproofing, correction, alteration and imposition of the paste makeup serving as the completed copy for the camera used in the plate making process. Paste makeup for the camera as used in this paragraph includes all photostats and prints used in offset or letter press work and includes all photostats and positive proofs of illustrations (such as Velox) where positive proofs can be supplied without sacrifice of quality or duplication of efforts. The employer shall make no other contract covering work as described above, which shall be performed only by journeymen and apprentices, especially no contract using the word "Stripping" to cover any of the work above mentioned.

addition, Respondent maintains a collective-bargaining relationship with six other unions.

The most recent contract between the parties extended from February 1, 1973 to January 31, 1976. On September 16, 1975, Robert L. Melton, president of the Union, sent the following letter to Kenneth Fleming, vice president and general manager of Respondent:

> You are hereby notified that as of January 31, 1976, our current collective bargaining agreement will expire. Negotiations should begin immediately so that a new agreement may be consummated by or before this January 31, 1976, expiration date.
>
> We hereby offer to meet with you for the purpose of negotiating an agreement with respect to wages, hours and other terms and conditions of employment.

On October 17, 1975, Fleming replied as follows:

> You are hereby notified that as of January 31, 1976, any agreement—written, oral, or implied—or any conditions of employment or other understanding, including any claimed custom or past practice, now in effect between Newspaper Printing Corporation and Tulsa Typographical Union No. 403 will terminate.[2]

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[2] This language used by Fleming is substantially similar to the language utilized by the Union in both its 1966 and 1972 contract termination/reopening notices to Respondent. In 1974, the parties being subject to the provisions of the recently expired contract, an arbitration proceeding arose as a direct result of the termination language utilized by the Union in its 1972 termination/reopening notice. Respondent had discontinued the pre-existing practice of granting washup time to composing room employees, and the Union objected to this as constituting a unilateral change in working conditions. The arbitrator ruled that Respondent was not precluded from making such changes, because the then current contract (1973-1976) contained no provisions for washup time, and the Union, by its termination language, had declared that any agreements, condi-

We hereby offer to meet with you for the purpose of negotiating an Agreement with respect to wages, hours and other terms and conditions of employment.

2. The Negotiations

The first negotiating meeting between the parties were held on November 11, 1975. The participants on behalf of the Union were Charles Jobe, chairman of the Union's negotiating or scale committee; Robert Melton, president of the Union; and scale committee members Phil Jones and John Blair. The participants for Respondent were Kenneth Fleming, vice president and general manager of Respondent; Robert Lorton, president of Respondent; and supervisors Dexter Jones, Jim Hathaway and Jack Fitzpatrick.

At the outset of negotiations Jobe presented Fleming with a letter suggesting that negotiating meetings be held each Wednesday until a contract was reached. Fleming stated that as a result of various appointments and commitments, Respondent could not commit itself in advance to this rigid schedule, and the Union did not object. A few days prior to the meeting Melton had furnished

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tions of employment or understandings under the prior contract would terminate as of the date of the expiration of the contract. Thus, the arbitrator ruled that the pre-existing practice could be unilaterally changed by Respondent with impunity.

In reopening the current contract negotiations, Respondent desired the same result. Fleming, elaborating, chose the similar language because:

> In view of his [the arbitrator's] ruling we wanted the contract that was . . . terminating on January 31, 1976 to be completely open to negotiations, including any implied past practices or what have you, and that's why I chose that language.

Conversely, as a result of the adverse decision of the arbitrator, the Union chose to never again employ such termination language, and therefore utilized the language set forth above in its September 16, 1975 reopening letter.

Fleming with a copy of the Union's contract proposals, but at the meeting Jobe advised Fleming that the aforesaid proposals should be disregarded as changes thereto had been recently made. Thereupon, Jobe presented Respondent with new contract proposals.

Melton inquired regarding the then-current court proceedings involving linotype equipment used in the composing room.[3] Fleming stated that he did not know what would be the outcome of the current litigation between OSHA and Respondent, but related that Respondent would undoubtedly abandon the hot metal linotype machines, and would acquire "cold type" or phototypesetting equipment to replace the linotype machines. Additionally, Fleming stated that Respondent's supplier of linotype parts was no longer going to stock such parts and necessary related materials, and that this enforced Respondent's present intent to abandon the linotype operation and install additional phototypesetting (also called "photocomposition") equipment in the composing room.

Fleming asked whether the scale committee had full authority to negotiate a new working agreement, being mindful of the parties' unpleasant experiences in prior negotiations in connection with the scale committee's apparent lack of authority to reach a binding agreement. Melton agreed that the matter should be clarified at the outset, and assured Fleming that he and Jobe, together with the entire scale committee, had full authority to negotiate an agreement without qualification.

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[3] Respondent had been previously informed by the Occupational Safety and Health Administration (OSHA) that certain linotype machinery in the composing room was unsafe, and that the situation should be immediately corrected. Respondent was attempting to secure an abatement period from OSHA during which time Respondent desired to investigate the various alternatives in this regard.

Fleming informed the Union that Respondent's proposals were not yet prepared because of major technological changes affecting the composing room that were then being considered and would be implemented during the life of the new agreement, and, in addition, because of an extremely busy schedule.[4] The parties then reviewed the Union's proposals in a general fashion, and, upon concluding this cursory examination, Fleming advised the Union of what would be incorporated in Respondent's proposals, emphasizing that Respondent desired to negotiate major changes in the Union's jurisdiction over particular work as a result of the introduction of new technology that would affect not only the composing room but various other operations of Respondent. Elaborating, Fleming stated that Respondent would be making large investments in new machinery and processes, and that the Respondent wanted complete flexibility in making job assignments, in placement of the new equipment, and in determining who would operate the equipment. Elaborating further, Fleming explained that initially, as soon as possible, Respondent would convert the composing room to a total phototypesetting process.[5] Continuing, Fleming

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[4] In this latter regard Fleming, at the hearing herein, provided the details of the pressing operational problems with which he was, at the time, confronted and which required immediate attention. Counsel for the Charging Party stated his willingness to stipulate that during the material period of time herein Fleming "was certainly a very busy man, trying to take care of all the problems that he had in administering all of the contracts and everything else." General Counsel implies, but the complaint does not allege, that Respondent engaged in dilatory tactics by not immediately responding to the Union's initial reopening letter of September 16, 1975, and by failing to have an initial contract proposal available at the initial bargaining session. I find this implied contention to be clearly without merit, the alleged delays in this regard having been caused by valid business considerations and, moreover, certainly cured by subsequent protracted bargaining.

[5] The work in the "composing room," actually comprising five separate rooms on the third floor of Respondent's building, then

stated that upon converting the composing room entirely to the phototypesetting process, Respondent intended to install a large and complex general-purpose computer system which would be designed for use not only in conjunction with phototypesetting work, but also for billing and other business purposes. Finally, as a result of the aforementioned innovations, both newsroom and classified advertising room application to the system would become feasible and would be implemented. Thus, a "front-end" system most likely consisting of sophisticated terminals, each containing a video screen and typewriter keyboard with additional "function" keys, would be utilized by newsroom employees and by classified advertising room employees whereby newspaper copy (ads or news articles) would be electronically transmitted directly from the newsroom and classified ad room terminals to the general-purpose computer for storage and recall. Such copy could then be directly transmitted to the composing room phototypesetting machinery, thus eliminating the need for various historic composing room processes.[6]

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included both phototypesetting and linotype or "hot metal" operations.

[6] The effect on the composing room employee complement is clear. Hard copy, or typewritten material, would no longer be customarily utilized within the composing room. As a result, composing room employees would no longer customarily perform the work involved in receiving hard copy from the newsroom or classified ad room, and in cutting, distributing, re-typing or re-keyboarding the hard copy, preparatory to further phototypesetting or linotype operations. And, with the advent of a total phototypesetting operation in the composing room, linotype machine operators would no longer be necessary. The implementations of such a new system, as described, would result in the extensive elimination of unit work, and a concomitant reduction in the number of unit employees. For a comprehensive explanation of the nature of the new technology and its effect on historic composing room functions, see the discussion appearing in *World Publishing Company*, 220 NLRB 1065, enfd. —— F.2d ——, (C.A. 8, December, 1976), 93 LRRM 3063.

Next, Fleming announced that Respondent wanted to negotiate from the contract the reference to the International Typographical Union (ITU) General Laws.[7]

When asked why Respondent objected to the incorporation of the ITU General Laws as part of the collective-bargaining agreement, Fleming related problems of "substitute hiring," which procedure was sanctioned by the general laws and therefore made a part of the collective-bargaining agreement by reference. This substitute hiring procedure, in effect, allowed the Union, rather than Respondent, to hire substitutes, sometimes, according to Fleming, with undesirable results. Fleming also announced that Respondent would be proposing changes in Joint Standing Committee procedures, explaining his reason in this regard.[8]

Fleming also brought up the subject of the contractual ITU Negotiated Pension Plan, whereby Respondent was

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[7] Prior contracts contained the following language in this regard:

ITU LAWS

SEC. 7. It is understood and agreed that the General Laws of the International Typographical Union in effect at the time of signing this agreement, not in conflict with law or this agreement, shall govern relations between the parties on conditions not specifically enumerated herein.

SEC. 8. Nothing contained herein shall be construed to interfere in any way with the creation or operation of any rules not in conflict with law or this contract by any chapel or by the Union for the conduct of its own affairs.

[8] Theretofore, the Union could, for example, immediately reinstate a discharged or disciplined employee simply by referring the discharge to the Joint Standing Committee, the contract providing that, upon the matter being referred to the committee, the "conditions prevailing at the time of dispute shall be maintained until resolved by the Joint Standing Committee." Upon the inability of the Joint Standing Committee, composed of two members from the Union and two from Respondent, to resolve the dispute, the matter was subject to arbitration.

required to contribute to the pension fund 50 cents per shift per employee, not to exceed five shifts per week, for the purpose of providing pensions on retirement, and also death benefits and other related benefits for covered employees.[9] Fleming related to the Union that it appeared that Respondent, as a result of the Pension Reform Act, may be held liable in the event of insufficient funding or improprieties in the administration of the plan despite the delimiting contract language. However, Fleming stated that Respondent was awaiting the opinion of counsel prior to making a contract proposal in this regard. Fleming also asked Melton for updated information concerning the plan. Melton replied that the descriptive booklet, which Respondent had in its possession, was the most current publication, but that he would secure additional information from the International regarding the plan.

Fleming also brought up the subject of union or "chapel" meetings on Respondent's premises, which he felt interfered with production. Jobe replied that chapel

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[9] The then-current contract had been the first contract between the parties containing provisions for the ITU Negotiated Pension Plan. During the prior contract negotiations Respondent indicated its willingness to allow employees to participate in the plan, the "contributions" simply being deducted from employees' wages, and paid into the plan by Respondent. Thus Respondent incurred no additional expense in this regard. The contract reflects Respondent's considered intent to avoid any liability as a participant in the plan, as embodied in the following contract language:

> In making this agreement [Respondent] in no way guarantees or assumes any liability for the actuarial soundness of the Plan, the payment of any benefits from the Plan (whether retirement death benefits and/or other related benefits), the exemption of said Plan by the IRS under the Internal Revenue Code, or any administration of the Plan.
>
> In addition, the above mentioned contribution shall constitute the sole obligation and liability of [Respondent] to the Plan and persons drawing benefits from the Plan.

meetings had been conducted for many years at a designated time in the composing room, and Fleming responded that some employees on the day shift cease work to attend the meetings, while other employees on the next shift arrive early for the meetings, and the visting and general conversations among employees tend to adversely affect production.

Fleming also explained that Respondent would propose the complete elimination and deletion of reproduction work from the new agreement.[10]

Fleming was also asked about apprentices. He replied that the innovations occasioned by the new technology would result in fewer jobs, and that he would not be opposed to reducing the contractual ratio of apprentices to journeymen, rather than having apprentices performing the jobs of displaced journeymen. Apparently the Union did not disagree with Fleming's thoughts on the matter.

Fleming stated his belief that employees had taken advantage of the Jury Duty section of the contract, whereby Respondent is to pay the employee the difference between jury compensation and his regular wages, maintaining that employees who were released early from jury duty should report to work or report that they were available for work, and implied that Respondent would propose contract language to this effect.

Fleming was asked whether, because of the pending OSHA suit involving the safe operation of the linotype

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[10] Reproduction work pertains to an historic contract provision whereby unit employees, in exchange for permitting Respondent to immediately use "matrices, plates, cuts or type of local advertisements or other local matter" furnished to Respondent from outside sources, have the right to reproduce this material within the composing room at a later date, merely to be discarded because it is no longer useful. This procedure is sometimes referred to as "setting bogus type."

equipment, Respondent would be immediately installing phototypesetting equipment. Fleming replied that he was going to begin pursuing this operational change very vigorously, but that he could not state the precise day on which the equipment would be purchased or installed. Jobe asked what kind of phototypesetting equipment would be utilized. Fleming reiterated that the phototypesetting machinery would be forthcoming, and stated that such equipment is similar to automobiles in the sense that you could buy a Volkswagen, or a Cadillac, but that either would perform the same essential functions.

Fleming was asked whether Respondent had given serious consideration to any newsroom front-end system equipment. He answered affirmatively, stating that in the newspaper printing industry, as a general rule, there had been a customary progression from the advent and use of phototypesetting equipment, to the use of a general purpose computer in conjunction therewith, and finally, to the installation of newsroom and classified ad room terminal hookups. The balance of the meeting was primarily concerned with a general discussion of the new technology.

Fleming asked for, and received, a current copy of the ITU General Laws, and was told that he would receive a revised copy of the general laws when such became available. The meeting ended with Fleming stating that he would check his schedule and advise the Union when he would be available for the next meeting.

Sometime shortly thereafter, Fleming advised Melton that certain management decisions had been made regarding the new technology, which decisions were hastened by the existing problems with OSHA, and that the new operations would be implemented in phases, the first phase, namely, total conversion to cold type in the composing room, to be completed in about September, 1976.

At this time the next negotiating meeting was scheduled for December 17, 1975.

At the December 17, 1975 session Jobe asked whether Respondent was prepared to submit its proposals, and Fleming again stated that Respondent was not, but that its proposals would be forthcoming. There ensued a very detailed discusison regarding the new technology, its application to the jurisdictional language of the contract, and its effect on job assignments, job classifications and the employee complement in the composing room unit.

The scale committee members asked specific questions about new equipment, the questions being directed toward discerning the effect of the new technology upon the bargaining unit, and the extent of potential job displacement. Fleming again discussed the three-phased sequence which would be followed, and stated that he did not know whether 3 jobs or 50 would be eliminated. He attempted to ease the apprehensions of the committee by stating that the conversion to the new equipment and processes would be implemented in phases, that the entire changeover would not take place instantaneously, and that job displacement could be handled as part of a gradual process dictated by the progressive phases of the conversion process. Fleming recalled to the scale committee the methods by which, in the past, certain phototypesetting equipment had been introduced, stating that there had been a very orderly process in making a prior conversion from hot metal to phototypesetting equipment in the composing room, that everyone cooperated and worked very diligently, that various training processes were implemented, and that the conversion was a smooth one. Fleming suggested that, similarly, the forthcoming conversion process could be so implemented, and further suggested that a chaotic situation could be avoided if the committee members would attempt to assuage the unfounded fears of the employees who might feel that their jobs would be suddenly eliminated.

There was discussion of the relative merits of various brands of phototypesetting equipment, Fleming stated his preferences, specifying the brand name and functions of the phototypesetting equipment and general purpose computer to be purchased. He indicated that the type or brand of terminals should have no real bearing on the parties' ability to reach agreement, as all terminals which were then being considered incorporated a typewriter keyboard with function keys and a video screen, and operated in a similar fashion.

Fleming explained that the new phototypesetting equipment would be located in the composing room and would be operated by composing room employees, as said employees had been operating this type of equipment and were familiar with it, having had prior operating experience and maintenance training on similar phototypesetting equipment. Fleming said that if terminals were purchased and located in the newsroom, which he indicated was Respondent's current intention, he did not believe that the type or brand name of terminal should be of major concern to the Union because composing room employees would not be operating this equipment; rather it would be operated by newsroom employees. Further, Fleming said that if terminals were put in the composing room for the purpose of recalling copy stored in the general purpose computer, the terminals would definitely be operated by composing room employees, who would be given training on the operation and repair of the terminals, regardless of the brand name of the terminal utilized.

Fleming told the committee that Respondent had been verbally advised by its counsel that Respondent did have a liability under the Pension Reform Act as a result of Respondent's participation in the ITU Negotiated Penison Plan, and that because of this liability Respondent desired to negotiate out of, and no longer participate in,

the plan. Jobe and Melton stated that they were not qualified to thoroughly discuss the plan, and Fleming suggested that they contact the ITU and obtain information regarding the plan in order to be able to engage in more constructive conversation regarding it.

Further, Fleming suggested that because of the serious problems that were developing in connection with the negotiation of new jurisdictional language in the contract, it would be advantageous for the Union to request assistance from the ITU. Jobe replied, in effect, that it was too early to call for ITU assistance. Fleming again suggested this course of action, and Melton replied that he would be talking with the ITU about the situation. It was agreed that further negotiating meetings would be held after the first of the year, the approaching holiday season being a particularly slack time and therefore amenable to vacation scheduling.

On or about January 7, 1976, Fleming received a letter from the scale committee, as follows:

> Dear Mr. Fleming:
>
> As Management indicated to the Union's Scale Committee they intend to install a new computer system for the purpose of producing the newspapers which will involve serious changes to the working conditions in the composing room affecting employees presently performing such work, this is a formal request for the following information, needed for the proper execution of our obligation to fully and fairly represent our members in the composing room:
>
> 1. What type of computer system is to be installed?
> 2. Where will the main computer or central processor and/or OCR-VDT-CRT equipment be installed?

3. If the computer is to be installed in another department than the composing room, will there be a control panel in the composing room?

4. Will composing room employees be allowed access to the main computer or central processor when located in another department. If not, why not?

5. Does the employer intend to establish a data processing system to include employees of other departments to process other than composing room work, such as accounting, bookkeeping, etc., regardless of jurisdiction lines?

6. Will composing room employees be trained by the employer in programming techniques and console operations, and/or operation of OCR-CDT-CRT equipment, including maintenance, in courses made available to the employer through the lease or purchase of the equipment?

Please advise by return letter.

SCALE COMMITTEE

Upon receipt of the letter, Fleming advised Melton that the subject matter would be discussed at the next negotiating session.

The next negotiating session was held on January 14, 1976. Fleming stated that he had received the letter from the scale committee and would like to discuss the matters contained therein and answer the letter verbally. Receiving an assurance that this procedure would be satisfactory, Fleming answered the questions *seriatim*.

With regard to questions 1 and 2, Fleming stated that he was interested in several Digital Equipment Corporation (DEC) general-purpose computers and that the computer (or central processor) decided upon would not be located in the composing room because of its size and

the environmental prerequisites attendant to its operation. He explained that Respondent was going to build an environmental computer room on the fourth floor of the World Building where the computer would be located, and further stated that the system would not only be utilized for production purposes, but that it would also be used for administrative purposes such as checking credit, and performing billing and accounts receivable functions. Fleming stated that, upon receiving more information from DEC, he would further elaborate on this equipment at future negotiating meetings. In response to question 3, Fleming stated that the computer's bank or panel must be located adjacent to the computer, and would therefore be located in the environmentally controlled room along with the computer, rather than in the composing room; if, for production reasons, any controls for the computer needed to be located in the composing room, they would be so located and would be operated by composing room employees. Fleming stated that the entire system needed to be laid out in order to determine what parts, if any, would be located in the composing room.

In response to question 4, Fleming said that as the main computer will be located in the environmental room, he believed that composing room employees would not need direct physical access to the computer, but, if necessary, that they could communicate with the computer with equipment located in the composing room. For efficiency reasons, Fleming stated, it would be inappropriate to require composing room employees to walk up and down flights of stairs to communicate with the computer. When asked how composing room employees might be able to communicate with the computer from the composing room, Fleming replied that either a VDT (video display terminal) type of terminal could be used for this purpose, or that another piece of equipment which has no video screen but prints out in hard copy

the instructions being sent to the computer could also perform this function.

With respect to question 5, Fleming answered the question, "Most certainly," but indicated that he did not know what was meant by "regardless of jurisdictional lines." He went on to explain that the new system was costing about $1½ million, and an outlay of this magnitude could not be justified merely for the handling of composing room work, adding that the work which the computer is capable of performing is in direct relationship to its size and cost.

Again Fleming was asked his thinking on the impact of the new system on the composing room unit. Fleming stated that he could not be specific until the full mechanics of the system had been decided upon, that he had no idea if 3 or 30 jobs would be affected, but that as soon and as quickly as possible Respondent would try to establish the impact it would have, which, because of the three-phased sequence of the system's installation and operation, would not create an overnight impact of significant magnitude. Fleming again explained the various stages, reiterating that the first step would be to eliminate the linotype machine or machines and complete the total conversion to cold type in the composing room, that the second step would involve installation of the general-purpose computer, and that placing terminals in the newsroom and ad room would constitute the final step.

Regarding question 6, Fleming responded that any equipment located in the composing room would be operated by composing room employees, who would certainly be trained to operate and maintain the equipment, stating further that the procedure would be similar to that followed in the composing room upon the partial changeover in the composing room to cold type which occurred several years earlier.

It also appears that at this meeting Fleming advised the Union of the estimated time frame for the institution of the new technology, explaining that the phototypesetting equipment would be installed in the composing room during the late summer of 1976, which would complete the conversion to cold type in the composing room; that the environmental equipment for the computer room, and the computers and related hardware could be delivered in about May, 1977; and that the terminal hookups in the newsroom and ad room, and possibly the composing room, could be installed and the entire system could thereby become operational by August 1, 1977.

Having responded to the questions, there was further discussion of workflow, new equipment, installation of equipment, and impact on the bargaining unit. Fleming said that when Respondent acquired updated information concerning the changes with which the Union was concerned, as reflected by the questions asked in the letter, the Union would be the first to know.

Fleming presented Respondent's written proposal to the Union at this time. Respondent proposed extensive jurisdictional language changes which essentially is expressed by the first paragraph of Respondent's jurisdiction proposal, as follows:[11]

> The jurisdiction of the Union and the appropriate unit for collective bargaining is defined as including only those employees engaged in all work which the Employer may from time to time designate to be performed in the Composing Room. It is the express intention of the Employer to accomplish his complete production needs in the manner which he determines to be the most effective and economical method to fulfill the work requirements.

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[11] Respondent's entire proposal is set out in Appendix "A."

Fleming suggested that as Respondent's jurisdictional language, having been necessitated by the nature of the planned technological changes, was quite different from the historic contract language, the Union would probably want to thoroughly study the language before making a response to it. Jobe indicated that such a procedure would be most advisable.

Fleming also mentioned that Respondent's proposal deleted reference to the ITU General Laws as being embodied in, and made a part of, the contract. Particularly, Fleming stated that Respondent was opposed to the substitute hiring procedure which is authorized by the General Laws. Fleming explained that although Respondent was not philosophically opposed to having regulars hire their own substitutes, regular employees have not always done so in Respondent's best interests, having sometimes hired or selected substitutes who were not capable of adequately performing the work in question. Thus, Respondent was not proposing the complete elimination of substitute hiring, but rather wanted the foreman to act as a monitor to assure that the substitute was a qualified individual. One member of the scale committee, objecting to the new proposed substitute hiring procedure, stated that on occasion the employees want to take time off from work to go fishing. Fleming said that this would still be possible, but that under Respondent's proposal the foreman would be apprised of this fact in advance. Fleming further said that as a result of new technology, composing room jobs are becoming more specialized, thus providing another reason for discounting the existing procedure of selection of substitutes by regulars. One member of the scale committee said it would be very difficult for the Union to agree to any contract without incorporation of the ITU General Laws.

There was considerable discussion about cleaning up gray areas in the priority or seniority board, the method

by which, according to the contract, situation holders and extras are to be hired "in strict priority order in the class of work in which they claim competency." Melton agreed that clarification of the priority hiring provision of the contract was warranted.

The ITU Negotiated Pension was again discussed, Respondent's proposal calling for its deletion, and Fleming requesting more information to determine how Respondent could be assured of incurring no liability as a result of participating in the plan. Melton said he was trying to get additional information.

At the end of the meeting Jobe said that the Union would study Respondent's entire proposal. Fleming asked whether the local committee felt it was in a position to resolve the issues without help from the ITU because of the seriousness of some of the issues. The committee indicated that it could resolve the issues, stating that intervention or assistance by an ITU representative was not then wanted because certain committee members felt that the ITU did not always primarily consider the local union's best interests. Fleming reiterated that because of the serious issues relating to technology changes, jurisdiction, job assignment, and job classification, he did not see how a contract would be able to be finalized without assistance from the ITU. Melton or Jobe affirmed that it might be rather difficult to resolve many of the issues, and Melton announced that he had been talking with the International and would be talking with ITU representatives on a continuing basis. Fleming stated that the contract would be expiring very soon, and that he hoped representation by the International would be forthcoming before the expiration of the contract. Fleming asked Melton if he had received an updated copy of the ITU General Laws, and Melton said he would check on this with the Union's secretary. The parties agreed to meet again on January 21, 1976, Fleming

suggesting that as the expiration date of the contract was rapidly approaching, the parties ought to meet more frequently and be more constructive particularly because of the major contract issues involved, and the fact that in these prior bargaining sessions so much time had been spent discussing new technology with no progress having been made.

The next meeting occurred on January 21, 1976. The scale committee questioned Respondent about its proposals, again discussing the matter of jurisdiction, which led to a further discussion of the new technology and its application to the composing room work force. The types of systems and equipment to be installed were again discussed. Fleming stated, in response to a question, that the overall impact on employees, and, in particular, the number of composing room jobs to be eliminated by the new technology, would be difficult to estimate with any degree of accuracy, but that this should not be of immediate monumental concern to the Union as reassignment of jobs, some retraining, and some attrition would minimize the problem during the various phases of the conversation process. Fleming was asked whether Respondent had considered and/or would consider proposing a guaranteed number of composing room jobs throughout the life of the agreement. Fleming said he would be more than happy to negotiate along these lines.

There was further discussion of deletion of the ITU General Laws, the Union again wanting to know why this was being proposed and Respondent again stating its reasons. Respondent's proposed changes in the priority or seniority hiring system were discussed. Fleming stated that hiring by strict priority sometimes had an adverse effect on Respondent by causing unqualified employees to be assigned work on particular jobs. Melton agreed with Respondent's concerns in this regard, stating that under the existing system employees not qualified to

perform a particular job would nevertheless assert their priority in an effort to obtain a more desirable job or shift.

Also, the matter of reproduction or setting bogus type was again discussed, the Union basically agreeing that this was a dead issue, and that it would not object to the deletion of the contract provision relating to reproduction work.

The ITU Negotiated Pension Plan was again discussed, Respondent having proposed that the plan be entirely deleted from the contract. The committee asked how much pension benefits would be reduced if Respondent stopped participating, to which Fleming replied, "how would we know?", there being no data from which to make such calculations.

Melton then declared that the scale committee was powerless to resolve major contract issues. At one point in the meeting Jobe stated that the scale committee had studied Respondent's jurisdictional proposal, and that "there's no way in the hell the Union could ever accept it, that to do so would be to kill the Union." Respondent's representatives asked him to elaborate, and Melton said the scale committee was powerless to resolve the issues of jurisdiction, ITU General Laws, ITU Negotiated Pension Plan, and the substitute hiring procedure as embodied in the ITU General Laws and made part of the contract by reference. Fleming stated that he had repeatedly suggested that the local union seek assistance or direction from the ITU because of the serious nature of the issues involved, and once again made the suggestion that ITU assistance be sought because of the nearness of the expiration date of the contract. At this point Fleming looked back in his negotiating meeting notes and read from them previous statements by members of the scale committee to the effect that the scale committee had the autonomy and authority to negotiate

and resolve all contract issues. Fleming said that if the local was now maintaining that it did not have such authority, then someone with the full authority and power to resolve the issues must be brought into negotiations. Fleming, apparently at this meeting, stated that he knew for a fact the local union had a vast degree of autonomy, and that the scale committee could indeed conclude an agreement with Respondent.

Lorton stated that there had been considerable discussion on all major issues, and that no progress was being made. Fleming stated that it appeared an impasse had been reached or was being reached. Jobe replied, according to Fleming, "Hell, call it what you want, impasse, deadlock or whatever—we are, without question, locked up on this thing. We're not making any progress." [12]

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[12] Jobe testified that during the January 21, 1976, meeting Fleming stated that the contract expired on January 31, 1976 and that therefore Respondent intended to make job assignments and use the new equipment in the most feasible and economical manner. Jobe replied that it was his understanding of the law that the parties were required to work under the terms of the old contract until either a new agreement or a bargaining impasse had been reached. Jobe categorically denies that either he or Melton or any other member of the scale committee made any statement to the effect that the parties were deadlocked or had reached a bargaining impasse. I credit Fleming and find that such statements, at both the January 21, 1976 meeting and later meetings, were made by Jobe/or Melton. Fleming favorably impressed me as a highly credible witness, with a vivid recollection of the entire course of bargaining negotiations. The record reflects that Fleming took complete minutes of each bargaining session, had such notes in his possession during his testimony, and referred to them when necessary to refresh his recollection of the events. The record does not show that the minutes, available to General Counsel and counsel for the Union, upon request, failed to support Fleming's testimony in various material respects. *Lennon* v. *U.S.*, 316 U.S. 129, 132; *General Engineering*, 125 NLRB 674. Further, although Jobe, Melton, Blair, and Phil Jones attended the bargaining sessions on behalf

Fleming asked what the scale committee proposed to do if it was powerless to negotiate, inquiring as to how the issues could be resolved. After continued discussion Jobe again stated, "Hell, Ken, I guess we've got an impasse." Again Fleming asked Melton, "If you are powerless, have you made any arrangements to bring an ITU representative in . . . ," and Melton replied that no such arrangements had been made. Jobe, who had previously said that an impasse had been reached, nevertheless stated that he did not believe the point had been reached for the intervention or services of an ITU representative. Upon being reminded by Fleming that Jobe had previously stated an impasse had been reached, Melton again said he would be continuing to talk with the ITU, as he had stated on several occasions at prior negotiating sessions.

There was discussion regarding the approaching contract expiration date, and it was suggested that the parties should meet more often and for longer periods. It was agreed that the next meeting would be held on January 28, 1976. Melton said that he was going to be talking with ITU headquarters, and that if the scale committee could meet prior to January 28, 1976, Fleming would be advised.

The following Monday Melton told Fleming that he had talked with ITU headquarters about the pension issue and questions in the jurisdictional area, and that the meeting between Respondent and the local union scale committee would be held as scheduled. Melton did not state that an ITU representative would be in attendance or would participate in the negotiations.

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of the Union, it is significant that none of these individuals were called as witnesses to corroborate Jobe's testimony, even though Jones did testify with regard to other matters. I further credit Fleming's testimony, for the same reasons, over the testimony of Jobe, to the extent that there is a material variation in their respective versions of the contract negotiations.

The parties met on January 28, 1976. Again the jurisdiction issue was discussed, Fleming explained that he was not attempting to limit the Union's historic jurisdiction which would continue to be commensurate with the physical boundaries of the composing room, but rather, by its jurisdictional language, Respondent merely wanted to clean up the outdated jurisdictional language in preparation for the new technology. All major contract issues were once more discussed at great length, Melton again stating that the local union was still attempting to get further information concerning the ITU Negotiated Pension Plan.

After considerable discussion Melton reiterated that the scale committee was powerless to resolve the major issues. Fleming queried whether any arrangements had been made for ITU assistance and Melton once again merely replied that he had been talking with the ITU. Fleming asked whether any ITU representative had been scheduled to attend or participate in negotiations, and Melton said, no. Fleming reviewed the situation, stating that it had been agreed an impasse had been reached, that the scale committee was powerless to resolve major contract issues, and that no help or assistance from the ITU was on the way. Both Melton and Jobe again confirmed that impasse had been reached, and Melton stated, "You know how this works, Ken. You know that we can't resolve this jurisdictional and some of these other key issues."

At this meeting, Fleming presented Melton with a letter from Respondent stating as follows:

> Not withstanding our several bargaining conferences and our explanation of our proposals for a new Agreement, we have been unable to reach agreement on any subject.

> We desire to be notified on or before January 30, 1976 with respect to your acceptance or final rejection of our proposal for new Agreement.
>
> In the event you have not accepted our proposal by that date we desire to withdraw each proposal and we will submit a new counter-proposal on February 1, 1976.

The record does not indicate any significant discussion regarding the letter, and Fleming was not asked to elaborate on the nature of the new counter proposal to be submitted to the Union on February 1, 1976. Melton stated he was going to be conversing with ITU headquarters and it was agreed that the parties would meet the following morning, January 29, 1976.

At the outset of the January 29, 1976 meeting Fleming asked whether a representative from the ITU would be in attendance. Melton said no. The scale committee, apparently responding to the aforementioned letter of the preceding day, stated that the Union had no desire to change either its jurisdictional proposal or any other proposals, explaining that the parties had operated under the old contract language for many years and that there was no need to make the changes proposed by Respondent. The major issues were discussed again, there being no change in the positions of the parties, and no agreement being reached. During the life of a prior agreement, before the implementation of phototypesetting equipment in the composing room, contract language dealing with this new process had been negotiated. The scale committee proposed that likewise, the parties could enter into a new agreement virtually identical to the old one, and reopen the contract and renegotiate on the applicable contract provisions during succeeding months or years prior to the implementation of the new technology. Fleming pointed out that he had no desire to begin operating under a new working agreement only to be burdened

with new contract negotiations some 60 or 90 days later, stating that both sides had sufficient data and information to resolve the problems at the present time. Fleming emphasized that Respondent was not attempting to "get [the Union] on a complete jurisdictional wipe out," and explained that Respondent was interested in negotiating a jurisdictional clause which would give Respondent flexibility in a changing technological area. Fleming explained that employees would be performing jobs in the future that they were not performing heretofore, that many jobs would overlap, and that Respondent did not want to be burdened with archaic contract language having no applicability or confusing applicability, to the new technology.

At this meeting, it appears that the Union proposed that during the year 1976 Respondent guarantee 180 situations or jobs, apparently the number of composing room jobs then in existence, and that the guaranteed figure be reduced by 5 situations each year over an 8 year period until a minimum of 145 jobs were guaranteed. Fleming stated that attrition alone would reduce the number of jobs at a more rapid rate, and suggested that the Union submit another proposal. Jobe replied, apparently at this meeting, that for internal union reasons, it would be more expedient for Respondent, rather than for the Union, to propose a lesser number of job guarantees.

Substitute hiring was again discussed, Fleming reiterating that Respondent was not basically opposed to a regular employee (situation holder) having a substitute when necessary, as in the past, but that Respondent desired the foreman to monitor the process and evaluate the competency of each substitute prior to the time the substitute commenced performing the work. The Union replied that it was powerless to change the ITU General Laws in this regard, which laws operated as the implementing language for the substitute hiring procedure.

Respondent reiterated its reasons for wanting to change or negotiate out of the pension plan because of liability over which Respondent had no control, imposed by the Pension Reform Act.[13] The scale committee again stated its general unfamiliarity with the specific problems created by the Pension Reform Act, and reiterated that it was still attempting to secure information in this regard which it had previously requested from ITU headquarters.

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[13] While it was not until after February 17, 1976, that Respondent received a statement directed to "all contributing employers, covered employees, local unions and other interested parties," and entitled Statement Adopted by the Board of Trustees ITU Negotiated Pension Plan, the statement sets forth the concerns which Respondent expressed to the Union during negotiations, as follows:

> The Trustees are well aware that employers generally are troubled that under ERISA they may be called upon legally to make contributions to a pension plan in addition to the amounts agreed upon in their collective bargaining agreements, if, on an annual basis, the plan shows deficit funding, or if it should terminate for lack of adequate funding. Fear of this so-called "open end" is not realistic in regard to the ITU Negotiated Pension Plan. The ITU Negotiated Pension Plan is certainly not about to terminate, nor will it operate on a deficit basis.

In December, 1975, Respondent had received from its corporate counsel, not representing Respondent in the instant matter, a letter consisting of a legal analysis with regard to the potential liability of Respondent as a participant in the ITU Negotiated Pension Plan. The 7 page analysis concludes that as long as Respondent is a contributing employer to the plan, it has potential liabilities over which it has no control, and such liabilities may arise even though Respondent fulfills the requirements of its agreement with the Union; and that therefore, the liability exposures and uncertainties indicate that Respondent should negotiate out of its obligations to contribute to the plan. Further, the analysis states that ITU allows union members to participate in the plan by making individual contributions, and thus the employees could themselves purchase the same benefits without imposing an unknown risk on Respondent.

Regarding this latter opinion by Respondent's counsel, record testimony was presented by the Charging Party that, in fact, no

Fleming stated that the contract was due to expire in 48 hours, that he would like to meet as often as possible prior to the contract's expiration, and that the Union should attempt to obtain the assistance of an ITU representative prior to the expiration of the contract. Melton stated his intention to speak with the ITU and to ask the ITU to send assistance prior to the expiration of the contract. Fleming stated that Respondent would be available to meet that afternoon, a Thursday, or anytime thereafter, including Saturday and Sunday, with a representative of the International, with the hope of resolving some of the major issues prior to the contract's expiration. Further, it was suggested by Fleming that if International assistance was not forthcoming, the scale committee and Respondent should meet again on Monday morning, February 2, 1976. Jobe said he would not be available as he had a prior social commitment which would cause him to be out of town for several days, and it was agreed that, as the scale committee did not want to meet without Jobe, the parties would meet on February 4, 1976, unless there was some communication from Melton that a meeting with an ITU representative could be arranged at an earlier time.

From January 29, 1976, to February 2, 1976, Fleming was anxiously awaiting some communication, by phone or otherwise, that the International would have a representative in attendance for an immediate meeting. Fleming was hopeful that, at the least, an International representative would phone him and generally indicate that progress in negotiations was a real possibility. However, no communication was received from either the local or the International, and on February 2, 1976, Fleming sent a letter to Melton (the complete text of which is

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individual employee contributions were possible under the plan. I regard the record as being inadequate to determine herein the correctness of either interpretation.

attached hereto as Appendix B), which states, *inter alia*, as follows:

> In light of the fact that the contract with your Union expired by its terms and notification on January 31, 1976, and pending execution of a new agreement or a continuation of the existing impasse, no provisions, past practices or obligations that existed under the prior contract will be effective.
>
> We announce the following work relationships that will exist not as a contractual understanding but work practices . . .
>
> This is not to the prejudice of the use of the collective bargaining process to reach a new agreement.

Obviously the Union was not impressed with the urgency of the situation expressed by Fleming at the January 29, 1976 meeting as it failed to immediately contact the International, as promised. Rather, Jobe testified that Melton, who had received Respondent's February 2, 1976 letter on the afternoon of that day, called a meeting of the scale committee at 4:00 p.m. that afternoon to discuss the matter and only then was it decided that the International should be contacted. Jobe testified in this regard as follows:

> A. We called international Headquarters in Colorado Springs and advised them we had received a letter of what we considered a change in working conditions, and that we felt like we needed assistance, an ITU representative, and after some lengthy discussion they said that they would get in touch with us and let us know what they had decided.

On February 4, 1976, the next negotiating meeting was held. Melton asked what the February 2, 1976 letter meant and whether it constituted the new counter proposal mentioned in Respondent's prior January 28,

1976 letter. Fleming replied that the February 2, 1976 letter meant precisely what it said. Fleming stated that since he was not advised that assistance from the ITU was forthcoming, it was necessary to institute the new rules and guidelines, which would continue to remain in effect until such time as a new working agreement had been negotiated. Melton asked whether Respondent was declining to bargain further, and Fleming replied that, to the contrary, Respondent wanted to negotiate and hopefully reach an agreement on all issues. Melton said that Jack Boris, an ITU representative, was due to arrive that day, and would be available for a meeting that afternoon. There was a general discussion of the February 2, 1976 letter, Fleming explaining the intent of the letter, item by item, and the procedures which would be followed in implementing the new procedures therein. Fleming stated that substitutes and regulars would be hired as in the past, except that the foreman is to be aware and apprised of each hiring situation, thus enabling the foreman to object to and apparently deny a request to hire a particular sub or regular prior to the time such employees commences work.

That afternoon Boris attended the negotiating session along with the regular members of the scale committee, and became the chief negotiator for the Union. Fleming had negotiated with Boris previously regarding the instiution of the current phototypesetting system, and thus the two individuals were acquainted with each other. Boris stated that he was somewhat vague on the issues, and a generalized conversation ensued involving the prior negotiations, Fleming reconstructing what had transpired over the previous weeks of bargaining. Boris stated that he felt there was no insurmountable problem and requested that Respondent withdraw the letter of February 2, 1976, and that the parties continue to adhere to the terms of the old contract, further stating that he would get busy and help the local union come up with

new jurisdictional language. Fleming refused to rescind the letter, replying that he did not regard the provisions of the letter as constituting an impediment to quickly finding solutions through negotiations on all the major issues. Boris said the Union could take the position, "no contract no work," and Fleming agreed that this could be done. Boris queried if Fleming wanted the employees to go on strike, and Fleming said he had no control over the matter. Boris then stated that he felt Respondent might be committing an unfair labor practice. Fleming disagreed, stating that an impasse had been reached and that Respondent was exercising its rights. Boris retorted that the Union fully intended to exercise all of its rights, and again asked Fleming to reconsider his initial position and withdraw the letter. Fleming declined to do so.

Boris reviewed Respondent's proposal on jurisdiction, and reiterated the position that had been taken throughout the course of bargaining by the scale committee, namely that with Respondent retaining the unequivocal right to remove work from the jurisdiction of the Union simply by unilaterally determining what work should remain in the composing room, Respondent was making it impossible for the Union to know for whom it was bargaining. Further, Boris stated that Respondent's proposal was in effect a proposal to destroy the bargaining unit by retaining the unilateral right to determine from time to time who would, or would not, be included therein. Fleming reiterated that the jurisdictional clause contained in Respondent's proposal was resigned to provide Respondent with the necessary flexibility to print its newspapers most efficiently and that, particularly for the purpose of accommodating the changes dictated by the new technology, Respondent wanted no limitation upon its right to remove any work from the jurisdiction of the Union, and desired the further unequivocal right to place new equipment and processes in the composing room, in which event Fleming assured Boris that the work in ques-

tion would be performed by composing room employees represented by the Union.

The next morning, February 5, 1976, a similar negotiating session took place, Boris again requesting withdrawal of the letter, stating that the Union would have to file unfair labor practices charges, and that the Union could take the position "no contract, no work." Fleming stated he did not believe Respondent had committed an unfair labor practice, and Boris said, "Well, we'll try to find an unfair labor practice to file." The meeting adjourned after about 30 minutes, there being very little discussion of the contract items. The next meeting was scheduled for February 12, 1976.

Further negotiating meetings were held on February 12, February 18, February 25, March 2, March 3, April 5, April 20, April 21, May 13, May 14, June 3, June 4, June 10, June 11, and August 26, 1976. While virtually all contract items were thoroughly discussed during the course of these negotiations, the parties concentrated their efforts on the jurisdictional language, which had readily been recognized as the overriding issue throughout the protracted negotiations. Various jurisdictional proposals were exchanged, Respondent consistently believing and taking the position that the Union was attempting to expand its jurisdiction into the newsroom, ad room, and computer room as evidenced by somewhat vague jurisdictional language proposed by the Union. And while Respondent modified its initial jurisdictional proposal as well as other contract proposals on several occasions, the jurisdictional modifications were designed to assuage the Union's alleged fears that certain historical composing room work would be removed from the composing room, but nevertheless Respondent continued to insist upon the widest latitude and flexibility to determine what work would be performed within the confines of the composing room, and thus, what would remain within, or be transferred into, the Union's jurisdictional sphere.

The negotiations from February 12 through August 26, 1976, were not entirely unproductive, Respondent agreeing that many sections of the prior contract would remain unchanged, including some contract items which had been unilaterally changed by Respondent as a result of its February 2, 1976 letter, such as certain functions of the Joint Standing Committee, the contract provisions regarding the Joint Apprenticeship Committee, and the right of the Union to conduct chapel meetings in the composing room "with permission of the foreman." Job guarantee proposals were made and discussed, and wage increases were proposed by Respondent, the proposed increases for the first year of the contract amounting to approximately 15 percent. Nevertheless, as stated above, the overriding jurisdictional issue remained the primary obstruction to the reaching of a new working agreement.

On June 11, 1976, a federal mediator, who had been assisting the parties during the course of negotiations since about May 13, 1976, stated to the parties that jurisdiction was the major area of disagreement, that he did not envision that agreement could be reached in this area, and that he felt taxpayer's money was simply being wasted by his participation in the unproductive and protracted negotiations.[14]

No further negotiations have taken place, the parties' respective positions having remained firm.

C. *Analysis and Conclusions*

1. The Unit-Jurisdiction Issue

The complaint contains the allegation that Respondent has violated Section 8(a)(5) of the Act by insisting upon

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[14] Both General Counsel and counsel for the Charging Party, in their respective briefs, acknowledge that a bargaining impasse was reached on or about June 11, 1976, at which negotiating meeting the federal mediator correctly characterized the status of negotiations as hopelessly deadlocked.

a contractual provision "which failed to sufficiently identify or define the collective bargaining unit or work of said employees so as to allow the Union to engage in meaningful collective bargaining regarding said employees or to otherwise represent said employees."

Respondent, utilizing the unit-jurisdiction clause format embodied in preceding contracts, and thus maintaining consistency with the Union's similar unit-jurisdiction clause format as proposed by the Union in the instant negotiations, initially proposed the following clause, *inter alia*, under the heading of "Jurisdiction":

> The jurisdiction of the Union and the appropriate unit for collective bargaining is defined as including only those employees engaged in all work which the Employer may from time to time designate to be performed in the Composing Room. It is the express intention of the Employer to accomplish his complete production needs in the manner which he determines to be the most effective and economical method to fulfill the work requirements.

Respondent's proposed clause serves a threefold purpose. Reduced to its component parts, the clause defines the appropriate unit for purposes of collective bargaining, established the Union's jurisdictional boundaries, and operates as a management-rights clause.

It is clear that the clause, when analyzed in this fashion, unequivocally sets forth an appropriate unit description.[15] Indeed, the parties have been operating under a similar unit description contained in a succession of collective-bargaining agreements over the course of many years, during which time apparently no contention has been made that the unit description was somehow defective. Thus,

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[15] "The . . . appropriate unit for collective bargaining is defined as including only those employees engaged in all work . . . in the Composing Room."

preceding contracts, including the most recently expired contract, have provided, also under the heading of "Jurisdiction":

> Jurisdiction of the Union and the appropriate unit for collective bargaining is defined as including all composing room work and includes classifications such as . . . .

Thereafter, the contract language proceeds to elaborate upon and identify the said composing room work be detailed specific classifications and job descriptions. Even so, the language is not exhaustive, allowing further assertions of jurisdictional claims by its open-ended phraseology.

Of course there is a distinction between the two above-quoted clauses. Thus, historically, both the unit and the Union's jurisdiction have been defined in terms of "all composing room work," leaving room for the contention that certain work which may be performed outside the composing room is nevertheless composing room work. That the Union so recognizes and relied upon this language is evidenced by the fact that in its initial contract proposal, apparently anticipating Respondent's conversion to the new technology, it desired to modify the contract clause entitled "New Processes" by adding the following language:

> In the event of the introduction of any new equipment, machinery or processes which replaces or is a substitute for, or evolution of present composing room equipment, machinery or processes, employees covered by this agreement will continue to perform all work thereon and these new processes, equipment and devices shall be within the jurisdiction of the Union as recognized by this agreement regardless of the method, equipment, or material used *regardless of where located, in the performance of such composing room work.* [Emphasis supplied.]

Conversely, Respondent desired to clearly confine the Union's jurisdiction, and thereby the unit, to the physical boundaries of the composing room, Respondent's proposed language defining the Union's jurisdiction, and thereby the unit, in terms of work to be performed "in the Composing Room." [16]

The requirement that a collective-bargaining representative is entitled to exclusive recognition in an identifiable appropriate unit [17] serves the necessary purpose of delineating, with particularity, a group of employees with whom the union is both entitled and obligated to bargain. Otherwise, meaningful bargaining could not take place. *Douds* v. *International Longshoremen's Association*, 241 F.2d 278 (C.A. 2, 1957). And once such a unit has been established, a party may not insist to the point of impasse that the unit be changed [18] because, among other reasons not pertinent herein, to do so may result in the disenfranchisement of employees who are entitled to union representation.[19]

There is no record evidence in the instant case, nor did General Counsel or counsel for the Charging Party ever

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[16] Significantly, the complaint herein defines the unit as "all composing room employees . . ." rather than in terms of "all employees who perform composing room work."

[17] *Columbia Tribune Publishing Co.*, 201 NLRB 538, 551; *McQuay-Norris-Manufacturing Company* v. *N.L.R.B.*, 116 F.2d 748, 751 (C.A. 7, 1940).

[18] The matter of the appropriate unit being clearly a nonmandatory subject of bargaining, proposed changes in the unit may not be insisted upon. *Hess Oil and Chemical Corporation*, 167 NLRB 115, enfd. on this point, 415 F.2d 440, 443-445; *N.L.R.B.* v. *Wooster Division of Borg Warner Corporation*, 356 U.S. 342; *Shell Oil Company*, 194 NLRB 988, 995, affd. 486 F.2d 1266 (C.A.D.C., 1973).

[19] E.g., *Hess Oil and Chemical Corporation, supra; Palm Beach Post-Times*, 151 NLRB 1030, 1044-1046, enfd. 375 F.2d 118 (C.A. 5, 1967); *Salt River Valley Water Users' Association*, 204 NLRB 83, enfd. 498 F.2d 393 (C.A. 9, 1974); *Hess Oil and Chemical Corporation, supra.*

attempt to show, that the unit has ever, in practice, actually included employees performing work outside the composing room despite the contract language which would arguably permit such expansion; nor is there evidence that during the long collective-bargaining relationship under numerous working agreements there was ever a meeting of the minds that the unit may encompass employees outside the composing room at some future date.

And while it may be argued that Respondent's insistence upon a more restrictive unit clause constitutes a deviation from the longstanding unit-jurisdiction description as recognized by the parties, the practical effect of the proposed language is to more carefully delimit the unit consistent with the realities of the working relationship between the parties through the years, and further, consistent with Respondent's interpretation of the intent of the traditional unit-jurisdiction clause. Most importantly, no employees will have been disenfranchised as a result of the Respondent's proposed unit language, and the Union is thereby able to engage in meaningful negotiations, knowing precisely that the unit of employees for which it is bargaining is the same unit for which it has always bargained.

Thus, as the clarifying change in the unit description proposed by Respondent does not appear to contain the inherent defects proscribed by established Board law, no employee being prejudiced or disenfranchised thereby, I find that Respondent's insistence upon such or similar language is not unlawful, and that, contrary to the allegation of the complaint, the proposed language does, in fact, define with particularity the appropriate collective-bargaining unit.[20]

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[20] *The Columbia Tribune Publishing Co.* case, *supra*, upon which both the General Counsel and counsel for the Charging Party place overriding significance, is clearly inapposite, the respondent therein not only flatly rejecting the union's proposed unit-jurisdiction

With regard to the jurisdictional aspect of Respondent's proposed clause, it is likewise clear that the clause unequivocally establishes the parameters of the Union's jurisdiction.[21] Again, this language is consistent with the past practice of the parties, as it appears that no work over which the Union was arguably granted jurisdictional rights had ever been performed outside the composing room. To be sure, Respondent deleted from its proposal the detailed, open-ended listing of job classifications and descriptions contained in preceding contracts, maintaining that under the new technology many of the described jobs, machines and procedures would no longer be in existence,[22] and that therefore such language would be superfluous or at least ambiguous when applied to the new methods and procedures which would come into existence under the new working agreement. However, it is clear, and I find, that by its proposal, including the deletion of such examples of composing room work from its jurisdictional clause, Respondent was not in any manner changing the intent of the historic language, as interpreted by Respondent and evidenced by past practice of the parties, ceding to the Union jurisdiction over all work in the composing room. Further, I find that, contrary to the complaint allegation, the jurisdiction of the

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clause, but also making it "very plain that no unit clause was acceptable." *Ibid.*, at page 551; moreover, respondent's attitude therein was prompted by a "desire to destroy the bargaining unit and undermine the Union's representative status in an effort to avoid agreement." *Ibid.* Such is not the case herein.

[21] "The jurisdiction of the Union . . . is defined as including . . . all work . . . in the Composing Room."

[22] At the hearing Fleming readily admitted that all the jobs enumerated in the prior contract were then "generally" still in existence and were being performed by composing room employees, as none had yet been eliminated by the new technology.

Union, or "work of said employees" was sufficiently identified so as to permit meaningful collective bargaining.[23]

Finally, the proposed clause operates as management-rights clause, which is discussed below under the heading of "Good Faith Bargaining."

2. Good Faith Bargaining

It is not disputed that, largely because of the advent of the new technology, and the problems attendant thereto, both parties regarded their initial "jurisdiction"[24] proposals as the very foundation, the *sine qua non*, of a working agreement, upon which all other contract provisions must rest.

The *World Publishing* case, *supra*, is strikingly similar in many respects to the instant case, certain contract proposals made and positions taken by Respondent herein during the course of bargaining being virtually identical to the facts in the *World Publishing* case. The reasons for the similarities are readily understandable, both the employer in the *World Publishing* case and the Respondent herein having operated under virtually the identical collective-bargaining agreement, and both having made the decision to update their respective newspaper operations with a similar technology.[25]

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[23] Even assuming that Respondent was attempting to remove from the Union's jurisdiction work which it had previously been granted, it is clear that Respondent would be permitted to insist upon such limitation of the Union's jurisdiction, the matter being a mandatory subject of bargaining, *infra*.

[24] As noted above, Respondent's "jurisdiction" proposal constituted a tripartite unit, jurisdiction, and management-rights clause, and is hereinafter considered as such.

[25] In the *World Publishing* case the introduction of the "scanner," another type of front-end system, became the central issue around which the entire course of bargaining revolved. Respondent in the instant case chose not to use a "scanner" type of front-end system

In finding that the employer in the *World Publishing* case had not failed to bargain in good faith with the union as alleged, the Administrative Law Judge, affirmed by the Board, made certain observations which are also instructive herein, as follows:

> The General Counsel relies on certain language in Board cases, quoting language originally uttered in a circuit court decision, that bad faith can be inferred from an offer that is so poor that no self-respecting union could accept it. This is an interesting and sometimes helpful observation but by no means has risen to the status of a doctrine in Board law. The fact is the law requires that the Employer shall bargain in good faith with an intention to reach a contract and history has shown that the ultimate terms of the contract normally depend on the "muscle," which is to say the economic power, of one party over the other. During the years that newspapers could not publish without the expertise of the composing room employees represented by the Charging Party, the Charging Party was able to get contracts that were extremely favorable to it; contracts that, like the 1972 contract, removed from the employer any right to determine who its employees should be and contracts that provided for the reproduction of material which came into the employer's hand ready for publishing. But there is no law that says that when economic power shifts from the Union to the employer that the employer cannot retrieve some of the economic benefits that it lost in the prior contracts. That is the situation here. With the introduction of the scanner, the Employer was for the first time physically able to

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because of the higher costs involved; however, both the "scanner" and the terminals which Respondent intends to use perform the same ultimate function, and thereby eliminate composing room work.

publish a newspaper without the expert service of the ITU members, particularly in running its linotype operation, and other hot metal processes. With the growing automation in the newspaper industry, Respondent had achieved no-strike clauses in its contracts with other unions which enabled it to limit the industrial battlefield to the members of the ITU.

While Respondent would certainly likewise acquire bargaining strength as a result of automation, it nevertheless was, during the course of bargaining, in a very vulnerable position, then being involved in an extensive building program, a lawsuit with OSHA involving allegedly unsafe linotype machines in the composing room, and extensive discussions with various manufacturers of components regarding the purchase of very technical equipment which Respondent desired to integrate into a functional system. However, in order to implement the new technology, Respondent needed to remove potential obstructions, and pave the way to a smooth transition to the new equipment and processes which would become operational not forthwith, but in various stages during the life of the new working agreement. Despite its vulnerable position, and knowing full well that the Union would be exceedingly reluctant to relinquish those favorable contractual provisions which it had acquired through the years, nevertheless Respondent felt compelled to take a stand, not for the purpose of undermining the Union, but, as the record shows, for valid business reasons.

Thus there is no evidence that Respondent, having armed itself with technological innovations, was motivated by a desire to destroy the bargaining unit and undermine the Union's representative status.[26] Rather, Respondent went to great lengths to explain to the Union

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[26] Cf. *Columbia Tribune Publishing Co., supra; Tomco Communications, Inc., infra.*

that such was not its intention;[27] and there is no record evidence that Respondent's conduct away from the bargaining table belied its stated lawful motivation. Nor does it appear that Respondent was attempting to avoid reaching a collective-bargaining agreement. On the contrary, it is clear that Respondent was exceedingly anxious to arrive at an agreement which would allow a smooth transition to the new processes. Indeed, observing that no progress was being made, Fleming repeatedly suggested that the scale committee obtain the services of an ITU representative in order to accelerate the bargaining process which had become stagnate. Finally, Respondent exhibited throughout negotiations a sincere willingness to consider the welfare of the unit members, many of whom were long-time employees, and was not adverse to negotiating regarding methods, such as retraining and job guarantees, whereby the transition would cause the least economic injury to members of the bargaining unit.

It is in this light that Respondent's proposed management-rights clause must be evaluated. While clearly defining the unit and setting forth the Union's jurisdiction, as found above, Respondent has proposed to reserve, as a prerogative of management, the unequivocal right to operate its business in what it deems to be the most efficient and economical manner. A corollary of this, which the Union finds to be most unacceptable, is the Respondent's intent to reserve to itself the very broad authority to determine from time to time what work shall be performed in the composing room.

In *Tomco Communications, Inc.*, 220 NLRB 636, the Board discusses the consideration to be afforded proposed management-rights clauses in evaluating the conduct of parties during the course of bargaining negotiations, stating:

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[27] See *N.L.R.B.* v. *Lewin Mathes Company, infra,* at page 331.

It is well established that an employer's insistence upon a management-rights clause does not, in and of itself, constitute a violation of Section 8(a)(5) of the Act.[1] However, the nature of an employer's proposals on management-rights and other terms and conditions of a collective-bargaining agreement are material factors in assessing the employer's motivations in the course of collective bargaining. Rigid adherence to proposals which are predictably unacceptable to the union may indicate a predetermination not to reach agreement, or a desire to produce a stalemate, in order to frustrate bargaining and undermine the statutory representative.[2]

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[1] *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395 (1952).

[2] *Stuart Radiator Core Manufacturing Co., Inc.*, 173 NLRB 125 (1968); *Continental Insurance Co.* v. *N.L.R.B.*, 495 F.2d 44 (C.A. 2, 1974).

It is therefore clear that a management-rights clause must be evaluated in conjunction with all other bargaining proposals and, moreover, the entire course of conduct during bargaining negotiations, in order to assess the good faith of a party. *International Woodworkers of America, AFL-CIO, Local 3-10* v. *N.L.R.B.*, 458 F.2d 852 (C.A.D.C., 1972). Obviously, as argued by General Counsel and counsel for the Charging Party, such exclusive retention of authority could, if abused by Respondent, theoretically result in the complete removal of all work heretofore performed in the composing room, for retaliatory or other reasons, to other areas of Respondent's facility, thereby eliminating the Union as a viable collective-bargaining representative. The Union voiced this alleged apprehension on numerous occasions during the course of bargaining, and Respondent consistently replied that the Union's fears were unfounded, that the composing room would always remain in ex-

istence, that certain composing room processes would not be affected or changed by the new technology, that new phototypesetting equipment was being placed in the composing room and would be operated by unit employees, and that the Union would retain jurisdiction over the work performed in the composing room.[28] However, Respondent wanted the unfettered right to install the expensive machinery and processes without being confronted with delays or interruptions which it anticipated could be caused by the Union's initiation of grievances,

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[28] It is highly questionable whether the Union was in fact fearful that Respondent would remove work historically performed in the composing room to other areas of Respondent's facility. Thus, although Respondent stated as specifically as possible what work would not be affected by the new technology and would therefore continue to remain in the composing room, the Union did not even request, prior to the impasse, *infra*, that such a verbal commitment be reduced to writing. Further, Respondent was not reluctant to reduce this commitment to writing, and proceeded to do so during the latter stages of negotiations. Thus, Respondent's proposal of March 3, 1976, contains the following under the heading of "Jurisdiction":

* * * *

When the Employer introduces new electronic typesetting systems such as video display terminals and/or optical character equipment, the following will be the arrangement for processing the work:

* * * *

2. Classified:—

Classified Display Advertising, which cannot be efficiently handled by the ssytem, shall be processed by employees covered by this Agreement.

3. Display Advertising.—

Display ads that require mark-up and/or paste-up will be processed by employees covered by this Agreement.

4. Typesetting Equipment:—

The photo-comp typesetting equipment will be located in the Composing Room. It shall be operated and maintained (if competent maintenance employees are available) by employees covered by this Agreement.

arbitration proceedings, and perhaps lawsuits, based in part upon ambiguous contract language. Further, Respondent desired to avoid similar potential disruptions after the new technology became operative. Finally, the work relating to the front-end system, which work Respondent intended to assign to employees outside the bargaining unit, would be, Respondent believed, better performed, for efficiency and other reasons, by newsroom or ad room employees rather than by composing room employees. As a result of these considerations, Respondent chose to reserve to itself one particular management prerogative, namely, the exclusive right to determine the work to be performed in the composing room. And Respondent desired very broad on-going prerogatives in this area as a result of possible production contingencies which apparently could not be readily anticipated or precisely defined until such time as a period of actual experience under the new systems could be evaluated.

Just as the Union had the right, which it exercised during negotiations, to insist upon contractual language which would, at least arguably, guarantee the assignment of certain work to unit employees and which would, Respondent believed, enlarge the Union's jurisdiction to areas outside the composing room,[29] so also did Respondent have the corresponding right to insist upon contractual language which would grant it the right to eliminate unit jobs[30] and assign particular work to whomever it selected.[31] Respondent, for valid business reasons,

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[29] See *National Woodwork Mfg. Ass'n.* v. *N.L.R.B.*, 386 U.S. 612, 642 (1967); *I.T.U. Local 38* v. *N.L.R.B.*, 278 F.2d 6, 10-12 (C.A. 1, 1960), affd. in pertinent part 365 U.S. 705 (1961).

[30] *Town and Country Manufacturing Co., Inc.*, 136 NLRB 1022, 1027, enf. 316 F.2d 846 (C.A. 5, 1963).

[31] See *NLRB* v. *American National Ins. Co., supra; N.L.R.B.* v. *Lewin-Mathes Co.*, 285 F.2d 329, 331-333 (C.A. 7, 1960); *Columbia Tribune Publishing Co., supra*, at page 551; *Texas Industries, Inc.*, 140 NLRB 527, 529-530.

and not for the purpose of attempting to undermine the Union or penalizing employees, chose to exercise its lawful rights in this regard.

It is true that from the outset of negotiations Respondent was determined to make basic changes in the working agreement; but "a firm position consistently maintained is not necessarily evidence of bad-faith bargaining." [32] As stated in *N.L.R.B.* v. *Herman Sausage Co.*: [33]

> If the insistence is genuinely and sincerely held, if it is not mere window dressing, it may be maintained forever though it produces a stalemate. Deep conviction, firmly held and from which no withdrawal will be made, may be more than the traditional opening gambit of a labor controversy. It may be both the right of the citizen and essential to our economic legal system . . . of free collective bargaining.

Based upon the foregoing, considering Respondent's proposed management-rights clause together with the entirety of Respondents' proposals, I find that the Respondent fulfilled its statutory duty to confer in good faith with the Union over the effect of automation on the bargaining unit and upon all other bargainable subjects presented during the course of negotiations, and that the evidence herein, viewed as a whole, does not disclose a motive or state of mind lacking the element of good faith.[34]

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[32] *Times Herald Printing Company*, 221 NLRB 225.

[33] 275 F.2d 229, 231 (C.A. 5, 1960).

[34] *Omaha Typographical Union, No. 190* v. *N.L.R.B.*, —— F.2d ——, (C.A. 8, December, 1976), 93 LRRM 3063. *Times Herald Printing Company, supra*; cf. *Tomco Communications, Inc., supra*; *Columbia Tribune Publishing Co., supra; Palm Beach Post-Times*, 151 NLRB 1030.

3. Bargaining Impasse

The applicable principles of law governing the right of an employer to institute unilateral changes during the course of collective bargaining are well established. In *Taft Broadcasting Co.*,[35] the Board has succinctly set forth these legal principles, and has specified the primary factors or standards to be considered and evaluated in connection therewith:

> An employer violates his duty to bargain if, when negotiations are sought or are in progress, he unilaterally institutes changes in existing terms and conditions of employment. On the other hand, after bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals. [Footnotes omitted.]
>
> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed. . . . an impasse is no less an impasse because the parties were closer to agreement than previously, and a deadlock is still a deadlock whether produced by one or a number of significant and unresolved differences in positions.

There is "no fixed definition of an impasse or deadlock which can be applied mechanically to all factual

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[35] 163 NLRB 475, affd. *sub nom. Television and Radio Artists, Kansas City Local* v. *N.L.R.B.*, 395 F.2d 622 (C.A.D.C. 1968).

situations which arise in the field of industrial bargaining. Nor is there a rigid formula for assessing so subtle an issue as the precise time when an impasse occurs." [36]

Although matters of serious import other than "jurisdiction" were certainly proposed and discussed at great length during the course of negotiations, the parties simply have been unable to resolve their "jurisdictional" differences. Such was the case early on in negotiations; such was the case on or about January 21, 1976, when, as I find, the parties reached a bargaining impasse; such was the case when on June 11, 1976, General Counsel and counsel for the Charging Party acknowledged that an impasse was reached upon the federal mediator, noting that the jurisdiction-unit issue constituted the major stumbling block between the parties, expressed reluctance in continuing to waste taxpayers' money by scheduling additional meetings; and, apparently, such is the case today.

It appears unnecessary to review in detail the specifics of the six bargaining sessions prior to February 2, 1976, described above, which were conducted over a period of nearly 3 months. While Respondent did not make a written proposal until the conclusion of the third bargaining session, it is clear that Respondent's general proposals were verbally presented to the Union commencing with the initial bargaining session, and were discussed at length at the first and all subsequent meetings. The parties had ample opportunity to discuss, and did discuss, the "jurisdiction" issue and all other issues to the point of stalemate, and after such discussions no indication of perceptible movement was exhibited by either party. There is no doubt that the Union believed that deadlock or impasse had been reached, as did Respondent.

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[36] *Dallas General Drivers, Warehousemen and Helpers, Local Union No. 745, IBT (Empire Terminal Warehouse Co.)* v. *N.L.R.B.*, 335 F.2d 842, 845 (C.A.D.C.), affg. 151 NLRB 1359.

Thus, at the January 21, 1976 meeting Jobe commented that the scale committee was powerless to resolve major contract issues and further stated, "hell, call it what you want, impasse, deadlock or whatever—we are, without question locked up on this thing. We're not making any progress." Later during that same meeting, after further discussion, additional statements regarding the scale committee's inability to resolve the key issues and the belief that a bargaining impasse was reached were voiced by the Union. Such beliefs were further reiterated by the scale committee during the meeting of January 28, 1976. And at the meeting the next day, January 29, 1976, the major issues were again discussed with no change in the positions of the parties.

At many prior meetings Fleming had requested that the scale committee seek assistance from the ITU because of the serious contract issues confronting the parties. At one point Fleming was told that the Union did not want International assistance because the International did not always represent the best interests of the Union. At other times Fleming was told by Melton or Jobe that they would talk with and/or had been in communication with the International. And when Fleming was finally told at the January 21, 1976 meeting, that the local was powerless to resolve the issues he expressed his disbelief, stating his opinion that the local, having been in communication with the International, was simply making unfounded excuses for failing to exercise the authority which the local body, at the outset of and throughout negotiations, admitted it possessed.[37]

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[37] It should be noted that the International is not a party to the collective-bargaining agreement, the expired contract containing the following explanatory language:

> This agreement is approved as being in compliance with the laws of the International Typographical Union, as limited by the Taft-Hartley law, and the undersigned on behalf of the Executive Council of the International Typographical Union,

Nor was the impasse broken by the scale committee's belated agreement on January 29, 1976, pursuant to Respondent's repeated exhortations throughout the course of bargaining, to finally request assistance from the International.[38] At the outset of bargaining the Union advised Respondent of the Union's complete authority to negotiate and enter into a new working agreement. Further, during the course of bargaining the Union had stated and reiterated that it indeed had been conferring with the International, thus causing Respondent to believe that the views propounded by the Union were also the views of the International. Finally, upon being told that the scale committee did not have the necessary authority, Respondent stated its disbelief, and advised the Union that its alleged lack of authority was merely being used as a convenient excuse to avoid its real bargaining obligation. At that point, Respondent was put on notice that continued bargaining with the Union would not result in an agreement. Nor could Respondent have reasonably believed that negotiating directly with the International would lead to a different result, as the International, so far as Respondent knew, had been advising the Union regarding its bargaining stance during negotiations. Being confronted with the utter futility of continuing bargaining with the Union, Respondent imposed a deadline, certainly not unreasonable under the circumstances, requiring the immediate intervention of

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hereby pledges as a matter of Union policy only, its full authority under its laws to the fulfillment thereof without becoming a party thereto and without assuming any liability, thereunder.

[38] Despite the Union's expressed verbal agreement to request bargaining assistance from the International, the Union's subsequent failure to do so until receiving the February 2, 1976 letter announcing the unilateral changes indicates that the Union had no real immediate intention of summoning International assistance, as agreed.

the International,[39] and impressing upon the Union that time was of the essence. Not even being contacted by the International, and having reached an impasse with the Union, Respondent chose to put into effect certain unilateral changes in terms and conditions of employment as embodied in its letter of February 2, 1976.

Under the circumstances, I find that a bargaining impasse began on January 21, 1976, and that the impasse was not broken merely by the Union's belated statement, shown above to be less than candid, to the effect that it would seek assistance from the International. Therefore, I find that Respondent was privileged to make certain unilateral changes on February 2, 1976, subsequent to the impasse. See *United States Sugar Corporation*, 169 NLRB 11; *Taylor-Winfield Corporation*, 225 NLRB No. 60; *Times Herald Printing Company, supra.*

4. The Unilateral Changes

Having bargained in good faith to the point of impasse, Respondent is thereafter free to make "unilateral changes that are reasonably comprehended within his pre-impasse proposals." *Taft Broadcasting Co., supra*; *Bi-Rite Foods, Inc.*, 147 NLRB 59, 65; *Taylor-Winfield Corporation, supra.* However, when unilateral changes are made which are not in line with or reasonably encompassed by the employer's pre-impasse proposals, a violation is established despite the existence of an impasse. *Ace Galvanizing, Inc.*, 217 NLRB 144; *Times Herald Printing Company, supra.*

At the initial bargaining session on November 11, 1975, Respondent advised the Union of what would be

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[39] Respondent expected more than mere intervention by the International, namely, some assurance from the International, by telephone or otherwise, of the prospects of movement which would break the impasse.

incorporated in Respondent's forthcoming proposals, including proposals regarding discontinuance of chapel meetings on company premises, modification of the Jury Duty provisions of the contract, and reducing the contractual ratio of apprentices to journeymen. And at the bargaining sessions of January 14 and 21, 1976, and thereafter, Respondent voiced its objection to the contractual priority hiring system, explaining that the complete elimination of the priority hiring concept was not being proposed; rather, Respondent was interested in clarifying certain ambiguous areas of the procedure which had caused disputes between the parties in the past.

Respondent, in its written proposal of January 14, 1976, omitted any reference to the above-mentioned matters, and the record shows further discussion only of the priority hiring system during the ensuing course of bargaining prior to the impasse. I therefore find that it was reasonable for the Union to believe that such matters, other than the matter of priority hiring which was discussed subsequent to Respondent's written proposal, enunciated by Respondent early in negotiations but not further pursued, were not thereafter advanced as specific bargaining proposals.

There can be no doubt that the withdrawing of permission to conduct chapel meetings on company premises constitutes a serious departure from the prior specific contract provision and apparently longstanding practice of permitting such meetings, and that requiring the Union to hold its meetings elsewhere results not only in inconvenience but also may result in economic detriment to the Union, and thereby to the employees.

During the course of bargaining, there was some discussion about reducing the contractual apprentice-journeymany ratio, and while the Union apparently voiced its acquiescence in this regard, no such written proposal was ever advanced. More importantly, however, Re-

spondent did not even mention, much less propose, during the pre-impasse bargaining, the elimination of the Joint Apprenticeship Committee. Thus, it is clear that not only was there no reference to proposed changes in the Joint Apprenticeship Committee in Respondent's contract proposal of January 14, 1976, but Respondent's unilateral change of February 2, 1976, completely eliminating the contractual Joint Apprenticeship Committee, goes far beyond any matter advanced by Respondent during the course of negotiations.

I therefore conclude that Respondent, by unilaterally instituting changes in terms and conditions of employment which go beyond, and were not reasonably comprehended within, its pre-impasse proposals, specifically the matters of chapel meetings and the Joint Apprenticeship Committee, has committed violations of Section 8 (a) (5) of the Act.[40] *Ace Galvanizing, Inc., supra; Times Herald Printing Company, supra.*

While the Jury Duty language contained in Respondent's unilaterally established "work practices" letter of February 2, 1976, has been extensively changed from the prior contract language, the record is not sufficiently clear to establish that the new Jury Duty language constitutes a material departure from actual past practice of the parties, or whether the language is merely a codification or clarification of past practice. Therefore, as insufficient record evidence exists to show that the new

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[40] Respondent's contention that the language used in its contract termination/reopening notice to the Union dated October 17, 1975, as interpreted by an arbitrator, above, thereby privileges Respondent to make unilateral changes upon the termination of the contract and without having arrived at impasse, is clearly erroneous, particularly where, as here, Respondent and not the Union is asserting the waiver of the Union's rights based upon the self-serving language contained in Respondent's termination/reopening letter. See *Kingsport Publishing Corporation*, 165 NLRB 694, 695, enf. denied on other grounds, 399 F.2d 660 (C.A. 6, 1968).

language constitutes a material departure from prior practices, I find that the necessary burden of proof has not been met to establish that Respondent, by the institution and implementation of such language, has further violated the Act.

With regard to the Joint Standing Committee, it is clear that at the outset of negotiations Respondent maintained that referral of a grievance to the committee should not operate as a stay or temporary reversal of a prior management decision. And in its proposal of January 14, 1976, Respondent preserved its position by proposing that the particular section of the contract was "open for discussion and clarification," thereby indicating to the Union that Respondent had not abandoned its prior verbal proposal in this regard. It appears that while disestablishing the Joint Standing Committee, Respondent is nevertheless not abolishing the underlying grievance procedure, stating in its February 2, 1976, letter that certain grievances "will be handled through a grievance procedure identical with the prior custom, but without arbitration, unless by mutual agreement." Under the circumstances, the matter not being fully litigated or briefed, the actual practice of the parties under the new grievance procedure not having been established (it seems that Respondent proposed on February 12, 1976, that the committee would, in fact, function), and there being other sections of the expired contract (Sections 6, 34 and 35) bearing on the matter but not placed into proper context during the course of the proceedings, I find the record evidence insufficient to show that the disestablishment of the Joint Standing Committee constitutes a material departure from the proposals advanced by Respondent during negotiations. Moreover, Respondent's refusal to honor provisions of an expired contract calling for arbitration of grievances, even though there has not been bargaining thereon, does not violate Section 8(a)(5) of the Act. *The Hilton-Davis Chemical Company*, 185 NLRB 241.

I find that the other unilateral changes announced in Respondent's February 2, 1976 letter and thereafter apparently instituted, were privileged, there having been requisite bargaining proposals and discussion reasonably encompassing the changes made with regard to substitute hiring,[41] priority hiring, jurisdiction, management rights, ITU General Laws, ITU Negotiated Pension Plan, and reproduction.

Conclusions of Law

1. Respondent, Newspaper Printing Corporation, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Tulsa Typographical Union Local No. 403 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has bargained in good faith to an impasse with the Union over the matters of jurisdiction, management rights, ITU General Laws, ITU Negotiated Pension Plan, priority hiring, substitute hiring, and reproduction, and has otherwise not been shown to have refused to bargain in good faith.

4. Respondent, by unilaterally instituting changes in certain terms and conditions of employment which were not reasonably comprehended within its pre-impasse proposals, namely, the elimination of chapel meetings on com-

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[41] I find that although Supervisor Marion Wood impliedly threatened Chapel Chairman (Union Steward) Phil Jones with discharge, Wood later told Jones he meant nothing by it, and such implied threat was made as a result of Respondent's belief that the Union was blatantly refusing to adhere to the new, lawfully implemented, work rules regarding substitute hiring, which had become effective on February 2, 1976. Having found that Respondent was privileged to make such changes, I find that Respondent's attempt to enforce the implementing rules by its implied threat to Jones, did not violate Section 8(a)(1) of the Act, as alleged in the complaint.

pany premises and the disestablishment of the Joint Apprenticeship Committee, has engaged in and is engaging in, unfair labor practices in violation of Section 8(a)(5) of the Act.[42]

5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

6. Except as found above, Respondent has not engaged in other unfair labor practies as alleged in the complaint.

The Remedy

Having found Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.[43]

Respondent will be required to restore the pre-existing practices concerning chapel meetings on company premises, and to re-establish and thereafter permit the functioning of the Joint Apprenticeship Committee, as such matters were applied, operated, and interpreted under

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[42] In subsequent bargaining proposals Respondent agreed to the prior contract provisions regarding the Joint Apprenticeship Committee, as proposed by the Union, and Respondent further proposed that chapel meetings be permitted in the composing room and employees then on duty be permitted to attend "with permission of the foreman." It therefore appears that subsequent bargaining has modified Respondent's original unilateral changes of February 2, 1976 to the extent indicated. There is no showing, however, that Respondent is now permitting chapel meetings to take place on company premises or that the Joint Apprenticeship Committee is now viable, Respondent perhaps taking the position that the unilateral changes will remain in effect until a new agreement is reached, as Respondent indicated in its letter of February 2, 1976.

[43] I do not regard the statements of counsel for the General Counsel and counsel for the Charging Party acknowledging an impasse to have occurred on June 11, 1976, as an implied assertion that the remedy herein should not be recommended.

the expired 1973-1976 collective-bargaining agreement, and as modified by collective bargaining subsequent to February 2, 1976. Further, Respondent will be required to post an appropriate notice.

There has been no showing that the Union and/or any particular unit employees haves been economically injured as a result of such unlawful unilateral changes, such potential injury being entirely speculative at the present time. Therefore, I shall leave for the compliance stage of this proceeding any further remedial provisions, includ-reimbursement to the Union for expenses incurred in holding chapel meetings elsewhere, and backpay and reinstatement for employees who may have been injured as a result of the discontinuation of the Joint Apprenticeship Committee, which further remedies may be determined to be necessary to effectuate the purposes of the Act.

Upon the foregoing findings of fact, and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[44]

ORDER

Newspaper Printing Corporation, its officers, agents, successors and assigns, shall:

1. Cease and desist from unilaterally changing preexisting terms and conditions of employment not reasonably comprehented within proposals made during the

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[44] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

course of bargaining, namely the matters of permitting chapel meetings on company premises, and the establishment and functioning of the Joint Apprenticeship Committee.

2. Take the following affirmative action, which it is found will effectuate the purposes of the Act:

(a) Restore and abide by the pre-existing practices regarding chapel meetings on company premises, and reestablish and permit the functioning of the Joint Apprenticeship Committee, as such matters were applied, operated, and interpreted under the collective-bargaining agreement, and as modified by collective bargaining subsequent to February 2, 1976.

(b) Post at its Tulsa, Oklahoma, facility copies of the attached notice marked "Appendix C."[45] Copies of the notice, on forms provided by the Regional Director for Region 16, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places within the composing room, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

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[45] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated: April 25, 1977

/s/ Gerald A. Wacknov
GERALD A. WACKNOV
Administrative Law Judge

APPENDIX A

NEWSPAPER PRINTING CORPORATION'S PROPOSAL FOR TYPOGRAPHICAL UNION #403

Agreement Section: Remain the same except for date changes.

Section 3: *JURISDICTION*

The jurisdiction of the Union and the appropriate unit for collective bargaining is defined as including only those employees engaged in all work which the Employer may from time to time designate to be performed in the Composing Room. It is the express intention of the Employer to accomplish his complete production needs in the manner which he determines to be the most effective and economic method to fulfill the work requirements.

In the event a computer and related equipment are located in the Composing room and such are used for Composing Room work, the jurisdiction of the Union will include only input originating in the Composing Room, but shall not include any input originating outside the Composing Room. This shall in no event be construed to be a limitation upon the right of management to cease any procedure or remove any equipment from the Composing Room, in the interest of efficiency. The Jurisdiction referred to herein shall not follow the equipment or procedures.

Nothing herein shall preclude preparing material to be sent outside the Composing Room for the making of photographically enlarged, reduced, screened, or reverse plates to be incorporated subsequently in copy to be used by the Publisher.

References to jurisdiction are for purposes of delineating between the various units of represented employees, not ownership of work.

Where savings can be realized or quality and consistency improved, it is agreed that the Employer may put into practice pre-printing of recurring items including but not limited to:

(1) Advertising borders, boxes and rules.

(2) Advertising signature cuts, including addresses and telephone numbers and other material normally incorporated in the signature.

(3) Typefaces and/or figures which are requested and/or provided by advertiser.

(4) Standing news, columnists and feature headings, continued lines, news fillers, masthead, standing boxes and other similar material.

(5) Want ad and other promotional material.

No duplication of work will be performed between departments, or employees, and should this occur, the Employer shall determine who will do the work.
In the event any news, editorial or advertising matter is received from any source, including but not limited to the leased wires of AP, UPI, syndicated news features (in forms such as scanner-ready copy, tapes for CRT and/or VDT), it is agreed that such matter shall be processed as directed by the Employer.

It is not intended that the Union's jurisdiction include the addition of creative artwork to repreduction proofs.

Nothing herein shall preclude sending glossy proof to a customer for the making of photographically en-

larged, reduced, screened or reverse plates by the customer to be incorporated in copy to be used by the Employer.

Nothing herein shall prevent the Employer from sending proofs of type to advertisers to be used in advertising material.

It is further understood that the Employer's right to perform Research and Development work on the aforementioned equipment and processes with persons not covered by this Agreement shall not be limited, provided such research and development is not producing live matter for any publication or printed products for sale by the Newspaper Printing Corporation.

Nothing in this section shall be construed as abridging in any manner the right of the Employer at his option to have installations made by experts, not to interfere with the temporary services of qualified and experienced traveling inspectors and repairmen.

Section 4: Eliminate.

Section 5: Remove . . . "who shall be a member of the Union". . . .

Section 7: Open for discussion and clarification.

APPENDIX B

February 2, 1976

Mr. Robert Melton, President
Tulsa Typographical Union #403
P.O. Box 44
Tulsa, Oklahoma 74102

Dear Bob:

In light of the fact that the contract with your Union expired by its terms and notification on January 31, 1976, and pending execution of a new agreement or a continuation of the existing impasse, no provision, past practices or obligations that existed under the prior contract will be effective.

We announce the following work relationships that will exist not as a contractual understanding but work practices as follows:

Wages: Unchanged.

Hours: Work will continue to be performed as presently scheduled, including lunch periods, holidays, and vacations.

Working Conditions: It is the express intention of the Employer to accomplish his complete production needs in the manner which he determines to be the most effective and economical method to fulfill the work requirements.

In this connection, Management shall exercise the right to cease any procedure or remove any equipment from the composing Room, in the interest of efficiency.

No duplication of work will be performed between departments, or employees, and should this occur, the Employer shall determine who will do the work.

No provisions of the ITU general laws or any other rules or bylaws of the International Typographical Union shall be considered applicable to the work relationships of this Employer.

There shall be no Standing Committee. Any disciplinary or discharge case that may arise will be handled through a grievance procedure identical with the prior customs, but without arbitration, unless by mutual agreement.

The priority system will only apply when increasing or decreasing the work force, with competency to perform the job in question as the determining factor. All situations shall be staffed only by the Employer. Situations will be filled and all placements handled exclusively by the Employer with competency as the highest criterion for selection and retention.

There will be no Chapel meetings held on the company premises.

There will be no deductions made for any pension plan. However, an amount equal to fifty cents for each shift worked, maximum weekly amount $2.50, shall be included in checks for each employee for disposition at his discretion.

There shall be no reproduction work not required by the Employer.

Jury Duty: Any regular full-time employee required to serve on jury duty shall be protected against loss of pay due to such service. This compensation shall be the difference between the pay received from the Court (as verified by the Court) and the scale of the employee. This compensation is applicable only if serving on the jury takes place during the individual's normal scheduled working hours and shall not be paid for any time off for which compensation is forthcoming under this agreement, such as holidays, vacation or other special pay.

There shall be no Joint Apprenticeship Committee. Any apprenticeships shall be handled exclusively at the direction of the Employer.

Funeral pay shall remain unchanged.

The provision of insurance for the loss-of-time will remain unchanged.

This is not to the prejudice of the use of the collective bargaining process to reach a new agreement.

Sincerely,

NEWSPAPER PRINTING CORPORATION

/s/ Kenneth S. Fleming
Vice President/General Manager

[Appendix C (Prescribed Notice to Employees) omitted in printing.]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 77-1796

NEWSPAPER PRINTING CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

TULSA TYPOGRAPHICAL UNION, LOCAL NO. 403,
INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO,
Intervenor.

JUDGMENT

Before: SETH, Chief Judge, MARKEY,* and HOLLOWAY, Circuit Judge.

THIS CAUSE came on to be heard upon a petition filed by Newspaper Printing Corporation, to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on September 23, 1977, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on March 13, 1979, and has considered the briefs and transcript of record filed in this cause. On May 19, 1980, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's order and denying the petition to review and set aside the Board's order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Tenth Circuit that the said order of the National Labor

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* Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

Relations Board in said proceeding be enforced, and that Petitioner, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

/s/ William J. Holloway, Jr.
Judge, United States Court of
Appeals for the Tenth Circuit

Dated: September 9, 1980

JULY TERM—September 9, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges and Honorable Howard T. Markey, Judge.*

No. 77-1796

NEWSPAPER PRINTING CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

TULSA TYPOGRAPHICAL UNION, LOCAL NO. 403,
INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO,
Intervenor.

This matter comes on for consideration of petitioner's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Judges Seth, Holloway and Markey, to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be

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* Of the United States Court of Customs and Patent Appeals, sitting by designation.

polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

By /s/ Robert L. Hoecker
ROBERT L. HOECKER
Chief Deputy Clerk

SEPTEMBER TERM—September 29, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable Howard T. Markey, Judge* and Honorable William J. Holloway, Jr., Circuit Judge.

No. 77-1796

NEWSPAPER PRINTING CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

TULSA TYPOGRAPHICAL UNION, LOCAL NO. 403, INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO,
Intervenor.

This matter comes on for consideration of petitioner's motion for recall and stay of mandate in the captioned cause.

Upon consideration whereof, it is ordered that the mandate of this Court issued September 9, 1980, is hereby recalled.

It is further ordered that the mandate shall be stayed until October 29, 1980, pending certiorari, and that if on or before that date there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that appellant has timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

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* Of the United States Court of Customs and Patent Appeals, sitting by designation.

The Clerk shall forward a certified copy of this Order to the Deputy Associate General Counsel, National Labor Relations Board and the parties of record.

HOWARD K. PHILLIPS, Clerk

By /s/ Robert L. Hoecker
ROBERT L. HOECKER
Chief Deputy Clerk

No. 80-698

JAN 5 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

NEWSPAPER PRINTING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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National Labor Relations Board
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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-698

NEWSPAPER PRINTING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the Board properly concluded that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act by insisting to impasse on unilateral control over the scope of the bargaining unit—a proposal that would have resulted in modification of the existing unit—and by thereafter making unilateral changes in terms and conditions of employment.

2. Whether the Board abused its discretion, under Section 10(c) of the Act, by ordering petitioner to restore the terms and conditions of employment that it had unilaterally changed and to bargain in good faith with the Union as the representative of its employees in the existing bargaining unit, as defined in the parties' most recent collective bargaining agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 625 F. 2d 956. The decision and order of the National Labor Relations Board (Pet. App. 23a-98a) are reported at 232 N.L.R.B. 291.

JURISDICTION

The judgment of the court of appeals (Pet. App. 99a-100a) was entered on September 9, 1980. A petition for rehearing was denied on the same date (Pet. App. 101a-102a). The petition for a writ of certiorari was filed on October 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 2-3. Also relevant are Sections 8(d), 9(b), and 10(c) of the Act, 29 U.S.C. 158(d), 159(b), and 160(c).

Section 8(d) provides in pertinent part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.

Section 9(b) provides in pertinent part:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this [Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *.

Section 10(c) provides in pertinent part:

> * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter * * *.

STATEMENT

1. Petitioner is an Oklahoma corporation, engaged in the printing, sale, and distribution of daily newspapers in Tulsa, Oklahoma, where its principal place of business is located (Pet. App. 2a, 32a-33a). For many years, petitioner's composing room employees have been represented by the Union[1] (Pet. App. 2a, 34a). The last collective bargaining agreement between the parties, which ran from February 1, 1973, to January 31, 1976, described the employee unit represented by the Union in the following terms (Pet. App. 34a n.1, 2a-3a n.1):

> Sec. 3. Jurisdiction of the Union and the appropriate unit for collective bargaining is defined as including all composing room work and includes classifications such as hand compositors, typesetting machine operators, makeup men, bank men, proofpress operators, proofreaders, machinists for typesetting machines, operators and machinists on all devices which cast or compose type of slugs, or film, operators of tape perforating

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[1]Tulsa Typographical Union, Local No. 403, International Typographical Union, AFL-CIO.

> machines and recutter units for use in composing or producing type, operators of all phototypesetting machines (such as Fotosetter, Photon, Linofilm, Monophoto, Coxhead Liner, Filmotype, Typro and Hadego) and employees engaged in proofing, waxing and paste makeup with reproduction proofs, processing the product of phototypesetting machines, including development and waxing; paste makeup of all type, hand lettered, illustrative, border and decorative material constituting a part of the copy; ruling, photoproofing, correction, alteration and imposition of the paste makeup serving as the completed copy for the camera used in the plate making process. * * *.

In practice, the "composing room work" described above was actually performed in five separate rooms on the third floor of petitioner's building (Pet. App. 38a-39a n.5, 2a n.1). The jobs listed in the contract union description were "generally" in existence and were being performed by the composing room employees throughout the collective bargaining negotiations described below (Pet. App. 71a n.22).

On September 16, 1975, Robert L. Melton, president of the Union, wrote Kenneth Fleming, petitioner's vice president and general manager, requesting that bargaining begin immediately for a new collective bargaining agreement to replace the current agreement, which was to expire January 31, 1976 (Pet. App. 35a, 3a). Fleming replied that any agreement, conditions of employment, or other understanding then in effect would terminate on the contract expiration date, and he offered to bargain for a new agreement (Pet. App. 35a-36a, 3a).

At the first negotiating meeting between the parties on November 11, 1975, the Union presented its contract proposal (Pet. App. 36a-37a, 3a). Discussion at the meeting and at a second meeting on December 17, 1975, centered on major technological changes that petitioner announced it planned to make, which would have resulted in the extensive elimination of unit jobs and a reduction in the number of unit employees (Pet. App. 37a-39a, 44a-45a, 3a). These changes included replacement of the traditional "hot type" process in the composing room with a new computerized "cold type" process (Pet. App. 38a-39a & nn. 5 & 6 3a-4a & n.3). Petitioner emphasized that it wanted complete flexibility in making job assignments and in placing the new equipment and determining who would operate it (Pet. App. 38a). The Union expressed concern about the effect of the new technology on the bargaining unit, the extent of possible job displacement, and the right of unit employees to operate the new equipment (Pet. App. 44a, 46a-47a).

Discussion of these matters continued at the third negotiating meeting on January 14, 1976 (Pet. App. 47a-50a, 5a). At the conclusion of the third meeting, petitioner presented its first written contract proposal (Pet. App. 50a, 81a). Petitioner's proposal eliminated the existing unit description in the current collective bargaining agreement and instead provided (Pet. App. 5a, 24a, 50a, 93a):

> The jurisdiction of the Union and the appropriate unit for collective bargaining is defined as including only those employees engaged in all work which the Employer may from time to time designate to be performed in the Composing Room. It is the express intention of the Employer to accomplish his complete production needs in the manner which he determines to be the most effective and economic method to fulfill the work requirements.

Petitioner's negotiator Fleming suggested that, as this proposed clause was "quite different from the historic contract language," the Union would probably want to study the language thoroughly before making a response to it (Pet. App. 51a, 5a). Union negotiator Jobe agreed that this would be advisable and the meeting ended with the parties' arranging to meet again on January 21, 1976 (Pet. App. 51a, 52a).

At the fourth meeting, on January 21, Union negotiator Jobe stated that the Union had studied petitioner's proposed unit/jurisdiction clause and "there's no way in the hell the Union could ever accept it, that to do so would be to kill the Union" (Pet. App. 54a, 5a-6a). He agreed with Fleming that an impasse had been reached on the issue (Pet. App. 55a, 6a). Negotiating meetings on January 28 and 29 produced no progress on the unit/jurisdiction issue (Pet. App. 56a-61a, 81a-82a, 6a-7a). On February 2, 1976, petitioner wrote the Union (Pet. App. 7a-8a, 61a-62a, 96a-98a):

> In light of the fact that the contract with your Union expired by its terms and notification on January 31, 1976, and pending execution of a new agreement * * * [and] a continuation of the existing impasse, no provisions, past practices or obligations that existed under the prior contract will be effective.
>
> We announce the following work relationships that will exist not as a contractual understanding but work practices as follows* * * .

The letter then stated that there would be no change in wages or hours but announced a number of unilateral changes with respect to working conditions, including the right of management to accomplish production needs in the manner it "determine[d] to be the most effective and economical"; "to cease any procedure or remove any equipment from the composing room, in the interest of efficiency"; and, in the event of work duplication between departments or employees, to "determine who will do the work" (Pet. App. 7a-8a & n.8, 96a).

In negotiating meetings held during the next seven months, virtually all contract items were discussed, but the parties concentrated their efforts on the unit/jurisdiction language, which remained the primary obstruction to the reaching of a new agreement (Pet. App. 8a, 65a-66a). The Union took the position that petitioner was demanding the right to determine unilaterally what work should remain in the Union's jurisdiction and who should be in the unit and was "making it impossible for the Union to know for whom it was bargaining" (Pet. App. 9a, 64a). Petitioner asserted that its unit/jurisdiction proposal was designed to provide the necessary flexibility to print its newspapers most efficiently and that, particularly for the purpose of accommodating the changes dictated by the new technology, petitioner wanted no limitation upon its right to remove any work from the jurisdiction of the Union, and desired the further unequivocal right to place new equipment and processes in the composing room (Pet. App. 9a, 64a). On June 11, 1976, a federal mediator, who had been assisting the parties, declared that the negotiations were hopelessly deadlocked, citing the unit/jurisdiction issue as the major area of disagreement (Pet. App. 9a, 66a & n.14). Negotiations ceased on August 26 (Pet. App. 9a, 66a).

2. A complaint issued on charges filed by the Union alleging that petitioner's conduct violated its obligation under Section 8(a)(5) and (1) of the Act to bargain in good faith with the Union (Pet. App. 31a-32a). Following an administrative hearing, the Board found, in agreement with its administrative law judge, that the parties had reached a bargaining impasse on January 21, 1976, and that the principal cause of that impasse was their disagreement over the contract unit/jurisdiction language (Pet. App. 24a, 81a). Unlike the administrative law judge, however, the Board concluded that petitioner's insistence on its proposed unit/jurisdiction clause violated Section 8(a)(5) and (1) of the Act because the clause would have given petitioner unilateral control over the scope of the unit and would have modified the existing unit (Pet. App. 24a-26a). Accordingly, the Board found that petitioner's subsequent unilateral changes in employees' terms and conditions of employment

also violated Section 8(a)(5) and (1), since petitioner's insistence on its unit/jurisdiction clause precluded a genuine impasse on the other issues (Pet. App. 26a-27a).

The Board's order directs petitioner to cease and desist from the unfair labor practices found and any like or related violations to restore the employment conditions that it had unilaterally changed and make employees whole for any losses suffered as a result of the unilateral changes, to bargain in good faith with the Union as the representative of its employees in the appropriate unit as defined in the most recent collective bargaining agreement, and to post appropriate notices (Pet. App. 27a-29a).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 12a-22a). Specifically, the court approved the Board's finding that petitioner violated Section 8(a)(5) and (1) of the Act by insisting to impasse on a nonmandatory subject of bargaining—*i.e.*, a contract clause that would have altered the scope of the existing bargaining unit and would have given petitioner unilateral control over the unit's scope (Pet. App. 12a-15a). Such a clause, the court held, would usurp the Board's broad authority to determine the appropriate unit under Section 9 of the Act (Pet. App. 12a), and would defeat the employees' right to bargain collectively through representatives of their own choosing by denying recognition to their designated bargaining agent in an established bargaining unit (Pet. App. 14a-15a).[2]

The court recognized that the transfer or automation of unit work is a mandatory subject of bargaining, but noted that petitioner "was not content with the right to bargain hard to a genuine impasse and thereafter to implement its proposed technological changes" (Pet. App. 16a). Rather,

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[2]The court rejected petitioner's contention that the Union was attempting to expand the unit description and held that, in any event, such conduct would not have provided a defense to the charge against petitioner (Pet. App. 17a-18a).

petitioner demanded contractual authorization "to alter the composition of the unit at will by unilaterally electing to transfer work out of the unit" (*Ibid.*). The court concluded that to give an employer such unilateral control "would effectively deprive unit employees of their statutory right to collective representation and bargaining as to the reduction or elimination of their jobs through work transfers or automation" since "the employer's unilateral action would place those jobs beyond the scope of the unit represented by the Union" (*Ibid.*).

Finally, the court approved the Board's order directing petitioner to restore all employment conditions that it had unilaterally changed and to bargain in good faith with the Union as the exclusive representative of its employees in the appropriate unit as defined in the parties' most recent collective bargaining agreement (Pet. App . 18a, 22a). The court rejected petitioner's contention that the Board's order "forces the parties to agree to a substantive contract term dealing with the placement of work in violation of the principles announced in *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 [1970]" (Pet. App. 18a). On the contrary, the court observed: "Nowhere in its order does the Board attempt to compel agreement on work placement or any other subject" (Pet. App. 19a). Moreover, "[n]othing in the Board's order purports to impede [petitioner's] planned conversion from 'hot' to 'cold' type" (Pet. App. 22a). "Rather, the order merely directs that in implementing the technological changes [petitioner] accord the union its rightful recognition as the representative of all employees in the appropriate unit." (*Ibid.*). The court, therefore, concluded that "the Board properly exercised its remedial discretion under § 10(c)" (*Ibid.*).[3]

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[3]In addition, the court approved the provisions of the Board's order directing a "rollback" of the conditions of employment petitioner unilaterally changed since there was no genuine impasse at the time the changes were implemented and each change constituted an independent violation of Section 8(a)(5) of the Act (Pet. App. 19a-22a). The court further concluded that the record did not support petitioner's contention that the remedial relief ordered by the Board here would be "economically prohibitive or punitive" (Pet. App. 22a).

ARGUMENT

1. An employer violates its statutory obligation to bargain in good faith by insisting, as a condition of agreement, that the union acquiesce concerning an issue outside the mandatory subjects of bargaining—"wages, hours, and other terms and conditions of employment" (Section 8(d) of the Act). *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349-350 (1958). It has long been settled that recognition of a collective bargaining representative as required by the Act and the scope of the bargaining unit, whether established by Board certification or by voluntary recognition, are not mandatory subjects of bargaining.[4] There can "be no genuine bargaining as contemplated by the Statute until complete recognition ha[s] been granted as the Act requires" (*McQuay-Norris Mfg. Co.* v. *NLRB*, 116

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[4]See *NLRB* v. *Wooster Division of Borg-Warner Corp., supra*, 356 U.S. at 343-344 (employer unlawfully insisted on recognition clause that substituted uncertified local union for certified international); *McQuay-Norris Mfg. Co.* v. *NLRB*, 116 F. 2d 748, 750-752 (7th Cir. 1940), cert. denied, 313 U.S. 565 (1941) (employer unlawfully insisted on clause recognizing union as representative only of union members in unit); *Douds* v. *ILA*, 241 F. 2d 278, 281 (2d Cir. 1957) (union charged with unlawful insistence on expanding geographical scope of unit); *Newport News Shipbuilding & Dry Dock Co.* v. *NLRB*, 602 F. 2d 73, 76-77 (4th Cir. 1979) (employer unlawfully insisted on altering unit description by replacing the words "designers" and "design" with the words "draftsmen" and "drafting," on asserted ground that change "was designed to reflect more accurately the type of work done by the employees in the unit"); *Hess Oil & Chemical Corp.* v. *NLRB*, 415 F. 2d 440, 443-445 (5th Cir. 1969), cert. denied, 397 U.S. 916 (1970) (employer unlawfully insisted on excluding laboratory and warehouse employees from existing contract unit); *NLRB* v. *Southland Cork Co.*, 342 F. 2d 702, 706 (4th Cir. 1965) (employer unlawfully insisted on restricting union recognition clause to "permanent" employees).

F. 2d 748, 751 (7th Cir. 1940), cert. denied, 313 U.S. 565 (1941)), and "[t]he parties cannot bargain meaningfully about wages or hours or conditions of employment unless they know the unit of bargaining." *Douds* v. *ILA*, 241 F. 2d 278, 282 (2d Cir. 1957). Moreover, by virtue of Section 9(b) of the Act, the Board has ultimate authority to determine the appropriateness of a unit for collective bargaining purposes (*id.* at 282-283). Applying these settled principles, the court below properly concluded that petitioner violated Section 8(a)(5) and (1) of the Act by insisting on altering the existing contractual unit description so as to redefine "the appropriate unit" to include "only those employees engaged in all work which the Employer may from time to time designate to be performed in the Composing Room" (see page 4, *supra*).[5]

2. Contrary to petitioner's contention (Pet. 19-26), it was not necessary to insist on altering the contract unit description in order to prevent automation from producing an expanded unit that would cover the editorial and advertising department employees, who allegedly have no community of interest with the composing room employees. At the time of the collective bargaining negotiations relevant here, unit employees in the composing rooms were performing essentially those functions described in the contract unit description (see page 3, *supra*). Without altering that description, petitioner was free to bargain in good faith with the Union about the changes to automated production it proposed to make and to institute those changes if the bargaining reached a *bona fide* impasse. Thereafter, if the effect of the automation, in petitioner's view, was to eliminate

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[5]Cf. *Columbia Tribune Publishing Co.*, 201 N.L.R.B. 538, 550-551 (1973), enforced in relevant part, 495 F. 2d 1384, 1388-1391 (8th Cir. 1974) (employer violated Act by refusing to agree on any contractual unit description because it wanted to retain flexibility to assign cold type work to employees outside the unit).

certain of the unit job functions, or to alter those functions so as to remove them from the scope of the unit, petitioner could have invoked appropriate Board procedures for clarifying the unit to exclude any job functions no longer within it. Alternatively, it could have invoked Board procedures to resolve any questions of representation presented with respect to the editorial and advertising department employees.[6] See *Bradford-Robinson Printing Co.*, 193 N.L.R.B. 928 (1971); *Jelco, Inc.*, 209 N.L.R.B. 827 (1974); *Marion Power Shovel Co.*, 230 N.L.R.B. 576 (1977).

Instead, petitioner sought to disregard the Board's authority under Section 9(b) of the Act to determine the appropriate unit, and to assign to itself the function of determining

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[6]Had petitioner sought to invoke these Board procedures, there would have been no basis for a charge that it was seeking to expand the unit to impose union representation on a separate, independent group of employees against their will. Cases cited by petitioner (Pet. 22), far from supporting its claim that it was required to alter the contract unit description to avoid such a charge, illustrate the illegality of employer attempts to assume authority to determine unilaterally the effects of automation on unit employees or unit job classifications. See *Metromedia, Inc., KMBC-TV* v. *NLRB*, 586 F. 2d 1182, 1187-1189 (8th Cir. 1978); *Graphic Arts International Union* v. *NLRB*, 505 F. 2d 335, 337 (D.C. Cir. 1974).

The Board's finding in the present case (Pet. App. 25a n.3) that the traditional composing room unit described in the contract "is appropriate for the purposes of collective bargaining and * * * that neither the appropriateness of the unit nor the Union's representative status is affected by the change from hot to cold type" is consistent with this analysis. That finding makes clear that petitioner has a continuing duty to bargain with the Union concerning the effects of automation on the composing room employees and may not unilaterally determine those issues. See *NLRB* v. *Columbia Tribune Publishing Co.*, 495 F. 2d 1384, 1390-1391 (8th Cir. 1974).

the scope of the unit, by the simple expedient of redefining the unit to include only those employees performing work it chose to designate to be performed in the composing room. Far from protecting employee free choice, petitioner thereby sought exclusive power to remove employees from positions in which they enjoyed union representation to positions in which they would have no bargaining representative to negotiate for them concerning the effects of petitioner's proposed changes in the way the work of the company was to be accomplished. Such an assertion of unilateral authority is in clear derogation of the Act's requirements with respect to recognition of a collective bargaining representative.

3. There is no merit to petitioner's contention (Pet. 26-29) that the Board's order imposes substantive contract terms on petitioner in derogation of the principles established in *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99, 103-109 (1970). The order merely requires petitioner to bargain with the Union, on request, in the bargaining unit as defined in the parties' most recent collective bargaining agreement (Pet. App. 28a).[7] As the court of appeals emphasized (Pet. App. 15a-16a), that provision does not foreclose petitioner from automating or transferring work out of the bargaining unit. But it does require petitioner to give timely notice and an opportunity to bargain about such changes to the unit employees' designated bargaining agent. Accordingly, the court below properly concluded that the order was a proper exercise of the Board's broad remedial authority under Section 10(c) of the Act.

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[7]Petitioner fails to recognize (Pet. 21 n.7) that it had agreed to the unit the Board here found appropriate (Pet. App. 25a n.3). Thus, the collective bargaining agreement of the parties defined the existing bargaining unit in which petitioner had for many years recognized the Union as the employees' bargaining agent (*supra*, pages 2-3). In these circumstances, the failure of the complaint to track precisely the contract unit description (Pet. 21-22 n.7) was not prejudicial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1981

DOJ-1981-01

No. 80-698

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEWSPAPER PRINTING CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

TULSA TYPOGRAPHICAL UNION, LOCAL NO. 403,
Respondents.

BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Respondents.

BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The American Newspaper Publishers Association ("ANPA") submits this brief amicus curiae in support of Newspaper Printing Corporation's Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. All parties to this suit have given ANPA written consent to the filing of this brief. Copies of such consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association (ANPA) is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of 1492 newspapers representi g over ninety percent of the total daily and Sunday newspaper circulation and a significant portion of the weekly newspaper circulation in the United States.

Both the Tulsa Tribune and the Tulsa World, which are printed and distributed by Petitioner, hold membership in ANPA as well as 19 newspapers in Oklahoma.

Concerned with matters of general significance to the profession of journalism and the newspaper business as a whole, ANPA seeks to present herein its views in an attempt to assist this court in addressing the significant matters which are the subject of this case.

This dispute between Tulsa Typographical Union, Local No. 403 ("TTU") and Newspaper Printing Corporation exemplifies the diversity of interests between craft unions and newspaper employers during the conversion from obsolete "hot metal" composition to "cold-type" production.[1] The employer—motivated by market pressures to streamline its operations and confronted with the necessity of a substantial capital investment—desires broad flexibility in implementing the modernization of its plant. (Petitioner's App. 38a). The employer's concern is, typically, that to bargain piecemeal over each technological innovation could unreasonably delay the conversion.

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[1] A comprehensive description of the nature of the new technology and its effect on traditional composing room operation appears in *World Publishing Company and Omaha Typographical Union No. 190*, 220 N.L.R.B. 1065 (1975), aff'd sub. nom., *Omaha Typographical Union No. 190* v. *N.L.R.B.*, 545 F.2d 1138 (8th Cir. 1976).

TTU, as Administrative Law Judge Wacknov noted, faces almost certain extinction of its traditional work assignments and a substantial reduction in the number of employees in the bargaining unit.[2] Unions typically have negotiated into collective bargaining agreements provisions for employment security, fringe benefits, higher wages and, occasionally, the assignment of bogus work. See e.g., ITU Bylaws, 1978, Sec. 26 (listing benefits to be included in collective bargaining agreements); *Omaha Typographical Union, No. 190* v. *N.L.R.B.*, 545 F.2d 1138 (8th Cir. 1976) (reproduction).

The decision below misconstrues the organizational and bargaining rights of employees in such a way as to completely override Newspaper Printing Corporation's rights to negotiate for flexible control over work assignments. In so doing, it compels the adoption in a collective bargaining agreement of substantive terms which would seriously jeopardize Newspaper Printing Corporation's authority to alter work assignments during the term of that new contract. ANPA's concern with the decision below extends far beyond its impact on the Tulsa Tribune and Tulsa World newspapers. Hundreds of newspapers and craft unions have agreed on representational language partially defining the composing room bargaining unit in terms of work performed. The combined unit-jurisdiction language of the expired collective bargaining agreement in the instant case, contains standard International Typographical Union boilerplate. Your amicus believes that at least 133 newspapers currently hold collective bargaining agreements with substantially similar language.[3]

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[2] (Petitioner's App. 39a, n.6) One commentator has noted that the bulk of current collective bargaining agreements contain provisions designed to mitigate the threat to employment security posed by technological change. "Automation and Collective Bargaining", 84 Harvard Law. Rev. 1822, 1854 (1971).

[3] A list of ANPA member newspapers having collective bargaining agreements containing such clauses is set forth in Appendix A for the Court's convenience.

QUESTIONS PRESENTED, STATEMENT OF THE CASE, AND STATEMENT OF THE CASE.

American Newspaper Publishers Association ("ANPA") adopts the questions presented, statement of the case, and statement of facts as set forth in the brief of the Petitioner, Newspaper Printing Corporation.

ARGUMENT

I THE DECISION BELOW UNDULY RESTRICTS MANAGEMENT'S RIGHT TO ASSIGN WORK AND EXERCISE CONTROL OVER THE PLACEMENT OF NEW TECHNOLOGY.

This case presents a significant issue in the law of labor relations: whether a company, in order to facilitate modernization of its production facilities, may lawfully bargain to impasse on a change in the unit-jurisdiction clause of its collective bargaining agreement which would acknowledge the historic bargaining unit while allowing the employer flexibility to alter work assignments and the equipment to be utilized.

In finding that the Newspaper Printing Corp. ("NPC") had bargained to impasse over a permissive subject of bargaining—the definition of the unit—the Court below misapplied the facts and misconstrued the law. The Court's opinion would allow unwarranted interference by the National Labor Relations Board into the bargaining process by taking from management its right to control the assignment of work. The decision of the Tenth Circuit Court of Appeals therefore contravenes established case law, and policies deeply rooted in the National Labor Relations Act.

In its decision below, the Court of Appeals sustained the Board's findings that NPC's proposed changes in the existing Collective Bargaining Agreement which would increase management's flexibility to reassign work and to pursue greater automation in its production methods were nonmandatory subjects of collective bargaining. The Court

then held that, notwithstanding the absence of any evidence of bad faith on the part of NPC, its bargaining to impasse on those changes was *per se* an unlawful refusal to bargain under Section 8(a)(5) of the Act. 29 U.S.C. § 158(a)(5). The basis for the Court's holding was two-fold: (a) NPC sought to achieve unilateral discretion over the scope of the bargaining unit, and (b) it insisted to impasse upon a modification in the unit description language contained in the then-current Collective Bargaining Agreement. *Newspaper Printing Corp.* v. *N.L.R.B.*, 625 F.2d 956, 963 (10th Cir. 1980).

Your amicus respectfully submits that the decision below ignores the fundamental purpose underlying judicial and administrative distinctions between mandatory and permissive subjects of bargaining.[4] The court's wooden application of the general rule that management may not insist upon changes in the descriptions of a bargaining unit has locked NPC into an interpretation of the scope of the unit —i.e., a unit extending beyond the composing room—that has never been adopted either by the parties to the negotiations or by those employees in the editorial and advertising departments which the unit-description clause is purported to embrace. This in turn bars management from obtaining contract language which enables it to change existing work assignments without union consent.

It is well settled that the parties to a collective bargaining agreement must recognize the existing bargaining unit. See, *Hess Oil & Chemical Corp.* v. *N.L.R.B.*, 415 F.2d 440 (5th Cir. 1969), cert. den., 397 U.S. 916 (1970); *N.L.RB.* v. *Southland Cork Company*, 342 F.2d 702 (4th Cir. 1965). A refusal to do so precludes meaningful negotiation over

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[4] "One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation." *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203, 211.

wages, hours or conditions of employment. *McQuay-Norris Mfg. Co.* v. *N.L.R.B.*, 116 F.2d 748, 751 (7th Cir.) cert. denied, 313 U.S. 565 (1941). Moreover, it is equally clear that insistence over the inclusion within a labor contract of permissive subjects of bargaining prior to bargaining over mandatory subjects is a *per se* unfair labor practice. *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 242 (1958).

Jurisdiction and the assignment of work to non-bargaining unit employees, however, are mandatory subjects of bargaining—particularly where new technology is to be introduced.[5]

The difficulty presented by this case is that the expiring jurisdiction-unit clause combines the mandatory subject of work jurisdiction with the non-mandatory subject of bargaining unit definition. Given the absence of any evidence of anti-union animus as the motivation for NPC's proposed contract changes, the decision of the Court below in essence creates the novel proposition that the entire subject matter contained within the jurisdiction-unit clause is a permissive subject of bargaining.

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[5] See *Metromedia Inc., KMBC-TV* v. *N.L.R.B.*, 586 F.2d 1182 (8th Cir. 1978); *World Pub. Co. and Omaha Typographical Union No. 190*, 220 N.L.R.B. 1065 (1975), aff'd sub. nom., *Omaha Typographical Union No. 190* v. *N.L.R.B.*, 545 F.2d 1138 (8th Cir. 1976); *Columbia Tribune Pub. Co. and Columbia Typographical Union No. 160*, 201 N.L.R.B. 538 (1973), enforced sub. nom., *N.L.R.B.* v. *Columbia Tribune Pub. Co.*, 395 F.2d 1384 (8th Cir. 1974); *Howmet Corp.*, 194 N.L.R.B. 523 (1972), enforced, 86 L.R.R.M. 1017 (1969); *Unit Drop Forge Division, Eaton Yale & Towne, Inc.*, 171 N.L.R.B. No. 73, 68 L.R.R.M. 1129, enforced as modified, 412 F.2d 108 (7th Cir. 1969); *Weston & Brooker Co.*, 154 N.L.R.B. 747 (1965), enforced per curiam, 373 F.2d 741 (4th Cir. 1967); *Almeida Bus Lines, Inc.*, 142 N.L.R.B. 445 (1963); c.f., *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, supra; *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962), enforced 316 F.2d 846 (5th Cir. 1963).

In affirming the Board's order, the Court below required the parties to return to the bargaining table under the status *quo ante*. In pertinent part the Board's order requires NPC to bargain with ITU.

> "as the exclusive representative of its employees in the appropriate bargaining unit *as defined in the most recent collective bargaining agreement . . .*"

(Petitioner's App. 28a). (emphasis added) The essential conflict, however, between Management's desire to introduce technology in the most efficient manner and TTU's desire to prevent worker displacement is not resolved by the Court's decision. There can be no denying that NPC's proposal which defined the bargaining unit "as all composing room work" was entirely consistent with the historical working relationship of the parties. (Petitioner's App. 34a). Administrative Law Judge Wacknov noted that NPC's proposal "defined with particularity the appropriate collective bargaining unit." (Petitioner's App. 70a).

Yet, the Court, 625 F.2d 963, ratified the board's requirement that, without TTU's consent, NPC must readopt the existing unit jurisdiction clause in toto as the only appropriate definition of the bargaining unit:

> Even if the proposed unit-jurisdiction clause did not contain [the management rights language], as the definition of an existing bargaining unit is not a mandatory subject of bargaining, Respondent *cannot lawfully insist to impasse on a modification of the existing clause.*

(Petitioner's App. 26a). (emphasis added). And the Court does not suggest how NPC may achieve lawful changes in work assignments without amending this clause.

As stated above, there is no question that work assignments are mandatory subjects of bargaining. See p. 6, supra. Case law has determined that had the existing collective bargaining agreement between TTU and NPC contained separate unit and jurisdiction clauses, its proposed management rights clause would have been a proper

reservation of its right to control work assignments. It is clear that, unless transfers are specifically prohibited by the bargaining agreement, management retains the right

> "to transfer work out of the unit if: (1) the employer complies with *Fibreboard* . . . by bargaining in good faith to impasse and, (2) the employer is not motivated by anti-union animus, Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1967)."

University of Chicago v. *N.L.R.B.*, 514 F.2d 942, 949 (7th Cir. 1975). Accord, *Boeing Company* v. *N.L.R.B.*, 581 F.2d 793 (9th Cir. 1978). If a company may transfer work during the term of the contract after bargaining to impasse, clearly it may bargain to impasse over jurisdictional language upon the expiration of a contract. "An employer is always free after termination of the contract to unilaterally change conditions previously established by the Contract," *N.L.R.B.* v. *Cone Mills Corp.*, 373 F.2d 595, 598 (4th Cir. 1967), provided the union is given a reasonable opportunity to bargain.

It is equally well settled that management may lawfully insist to impasse over management functions clauses provided the subject matter is mandatory. *International Woodworkers Local 3-10* v. *N.L.R.B.*, 485 F.2d 852 (1972); *N.L.R.B.* v. *American National Insurance,* 343 U.S. 395 (1952).

In *American National Insurance,* management's insistence upon full control over promotions, discipline and work scheduling was found not to be an unfair bargaining practice. In upholding the 5th Circuit's refusal to enforce a Board order which prohibited management from insisting on such a clause, Justice Vinson noted that the Board's argument rested on highly technical grounds:

> "[I]t is conceded that [employer] would not be guilty of an unfair labor practice if, instead of proposing a clause which removed some matters from arbitration, it simply refused in good faith to agree to the Union proposal for unlimited arbitration."

Id. at 407. Similarly, the decision by the court below rests on overly technical grounds. The court below noted that NPC could have avoided an unfair labor practice by "bargain(ing) hard to genuine impasse and thereafter implement(ing) its proposed technological changes." 625 F.2d at 964.

Although NPC tentatively had formulated a general timetable setting forth its goals with respect to conversion to cold-type technology (Petitioners' App., at 44a-45a) the full mechanics of the new system had not yet been determined and NPC was unable during negotiations to specify the precise number of unit jobs which might be eliminated. While this uncertainty did not foreclose negotiations as to retraining programs, or other employment security provisions, it certainly was a legitimate basis for NPC's desire to retain as much flexibility as possible with respect to the timing and placement of automation. Yet the Court has overridden NPC's lawful right to seek such flexibility and has given NPC, in its negotiations with TTU, no choice but to readopt the expired unit-jurisdiction clause.

And if, during the term of the new collective bargaining agreement, NPC is unable to obtain TTU's consent to the introduction of cold-type technology manned by advertising and editorial department employees, the introduction of such technology could expose NPC to substantial arbitration penalties founded upon a violation of the unwanted and obsolete work jurisdiction provisions of the unit-jurisdiction clause.[6]

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[6] One arbitrator has noted that the interpretation of anachronistic unit-jurisdiction clause language is "fraught with ambiguity." *Beacon Journal Pub. Co.*, 63 L.A. 453 at 461. Employers frequently are found in violation of their collective bargaining agreements upon the introduction of new technology. See *Newspapers, Inc. and Milwaukee Typographical Union No. 23*, 88 ANPA Labor Bulletin, 377 (Arbitrator Lewis E. Solomon, 1974). Cf. *Beacon Journal Pub. Co., supra.*

The practical result of the decision below, therefore, is that once a collective bargaining agreement is signed which defines a bargaining unit in terms of work then being performed within the unit, management may thereafter forever lose control over the introduction of labor-saving technology which involves the assignment of work outside the bargaining unit, even though management's decision to convert to such technology "lie[s] at the core of enterpreneurial control." *Fibreboard Paper Products Corp., supra,* at 223 (Stewart, J., concurring).

Of course, the decision of the Court below, in affirming the underlying order of the N.L.R.B., would purport not to have this effect. *Newspaper Printing Corp.* v. *N.L.R.B.,* 625 F.2d at 965. The Court of Appeals would have one believe that its decision merely preserves the organizational rights of the bargaining unit. Yet NPC's proposed unit jurisdiction clause was neither intended, nor would operate, to alter the bargaining unit as recognized historically by the parties.

With respect to the question of NPC's good faith in its negotiations with TTU, Judge Wacknov found:

> "there is no evidence that Respondent having armed itself with technological innovations was motivated by a desire to destroy the bargaining unit and undermine the Union's representational status. Rather, Respondent went to great lengths to assure that such was not his intention, and there is no record evidence to suggest that Respondent's conduct away from the bargaining table belied its stated lawful motivation."

(Petitioner's App. 74a-75a). This finding was left undisturbed by the 10th Circuit Court of Appeals and the Board.

Moreover, resolution of charges of an unlawful refusal to bargain in good faith in the context of proposals for management's rights clauses does not lend itself to the 10th Circuit Court of Appeals' mechanical application of a *per se* rule:

> Any fears the Board may entertain that the use of management functions clauses will lead to invasion of an employer's duty to bargain collectively as to rates of pay, wages, hours and conditions of employment do not justify condemning all bargaining for management functions clauses covering any condition of employment as *per se* violations of the Act. The duty to bargain collectively is to be enforced by the application of the good faith bargaining standards of § 8(d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions clauses altogether.

American National Insurance v. *N.L.R.B.*, 343 U.S. 395, 405 (1952).[7]

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[7] See also, *Int'l Woodworkers, Local 3-10* v. *N.L.R.B.*, 458 F.2d 852 (D.C. Cir. 1972) ("An employer proposal of a management functions clause for inclusion in a labor contract is not per se an unfair labor practice . . .. The mere fact that a subject is an appropriate one for collective bargaining does not mean that the employer may not seek by agreement to reserve the matter to itself." Id. at 859). The authority reserved unto management by the "management functions clauses" in *American National Insurance and Int'l Woodworkers, Local 3-10* included control over work schedules, employee discharge, the number and types of business operations, and employee layoffs and terminations, mandatory subjects of bargaining, management's decisions with respect to which, as in the instant case, may result in "the reduction or elimination of [union] jobs . . . ." *Newspaper Printing Corp.* v. *N.L.R.B.*, 625 F.2d at 964. It is unclear how the unilateral discretion, proposed under the management functions clause in the instant case, impairs the representational rights of employees anymore than in the discretion reserved by the employers in *American National Insurance* and *Int'l Woodworkers, Local 3-10*. The rights accorded employees under § 8(a)(5) and § 9(a) are the rights to require management to bargain in good faith and to bargain with the employees' designated representative over mandatory subjects. The scope of management's right to negotiate—and the union's rights to oppose in negotiations—a clause reserving such subjects unto management during the life of a new collective bargaining agreement is not dependent upon whether management's subsequent decisions on such subjects may reduce the "scope of the unit" through the elimination of jobs.

The Court's finding of a refusal to bargain in good faith under §8(d) of the Act [29 U.S.C. §158(d) (1976)] is predicated upon the findings that NPC's proposal would have given NPC "unilateral control over the scope of the unit; and that the definition of an appropriate unit is not a mandatory subject of bargaining . . ." 625 F.2d 961.

It is true that management may not insist to impasse upon a realignment of the bargaining unit. There is no requirement, however, that any particular form of words be used to describe the unit—particularly where there is no certification, but rather voluntary recognition, of the bargaining unit. The requirement is solely that the union must know whom it represents.

> The parties cannot bargain meaningfully about wages, hours or conditions of employment unless they know the unit of bargaining.

Douds v. *Longshoremen's Association,* 241 F.2d 278, 282 (2nd Cir. 1957).

And to require that absent TTU's consent to an amendment, an insistence upon changes in the prior unit jurisdiction clause is a *per se* unfair labor practice contravenes the basic policy of §8(d) of the Act which is designed to promote the resolution of disputes arising from such factors as the introduction of labor saving technology, in the context of collective bargaining without undue intervention by the Board.

Particularly when proposals for changes in a Collective Bargaining Agreement are not motivated by an anti-union animus, but rather by a legitimate desire to accommodate changes in work jurisdiction necessary for management to meet its production needs more efficiently, both parties must be given the highest degree of freedom to reach agreement through collective bargaining. Collective bargaining over the introduction of new labor-saving technology promotes the purposes of the National Labor Rela-

tions Act "by bringing a problem of vital concern to labor and management within the framework established by Congress as most conductive to industrial peace." *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 201, 211 (1964).

For that reason, the Supreme Court has declined to "impute to Congress an intent in § 8(e) [29 U.S.C. § 158(e)] to preclude labor-management agreements to ease the effects [of automation] [e.g., worker displacement] through collective bargaining on the most vital problem created by advanced technology." *Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612, 642 (1967). On the contrary

> "[t]he History of the Act evinces a clear congressional purpose to assure the parties to a proposad collective bargaining agreement the greatest degree of freedom in their negotiations, and to require the Board to remain as aloof as possible from regulation of the bargaining process in its substantive aspects.

Wooster Division of Borg-Warner Corp. v. *N.L.R.B.*, 356 U.S. 342, 349 (1958) (Justice Harlan, dissenting).

Finally, there is no basis for the finding that NPC's proposal would grant unilateral discretion to reduce the scope of the unit in such a way as to violate its employees' right to organize and bargain through their chosen representative.

Unlike the facts presented in *N.L.R.B.* v. *Columbia Tribune Publishing Co.*, 395 F.2d 1384 (8th Cir. 1974), NPC has not refused to include a definition of the unit in the collective bargaining agreement. NPC at all times stood ready to recognize the bargaining unit as consisting of employees in the composing room. (Petitioner's App. 49a, 53a).[8]

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[8] *Columbia Tribune* may also be distinguished by the fact that the Court found substantial evidence to indicate that management, in discussing the jurisdictional issue, was engaged in the dilatory tactics associated with surface bargaining." *Id.* at 1391.

The Court's reliance on *Newport News Shipbuilding & Drydock Co.* v. *N.L.R.B.*, 602 F.2d 73 (4th Cir. 1979), is also misplaced. In that case management sought to remove employees designated by the job description "draftsmen" from the bargaining unit by substituting the more restrictive term "designers". The Court noted "that the substitution [of the terms] would diminish the size of the unit." Id. at 79.

Yet, it is apparent that the precise respect in which management's proposal was violative of the Act was that unit members would be disenfranchised. More specifically, the draftsmen would be coerced into relinquishing their right to inclusion within their traditional bargaining unit. Id. at 77.

In the instant case, NPC's proposal would not remove composing room employees from their unit. NPC would not achieve discretion to force typesetting machine operators, makeup men, linotypers or anyone else from the bargaining unit. The only discretion sought by management over the scope of the unit was the discretion to reduce its size through the lay-off of employees concommittant with the introduction of automation.

CONCLUSION

Traditionally, the Board and Courts have found work jurisdiction to be a mandatory subject of collective bargaining. The requirement that employers negotiate in good faith with Union representatives over the assignment of work outside the bargaining unit until an agreement, or a lawful impasse has been reached, promotes the purposes of the National Labor Relations Act. Scientific research and the resultant development of new manufacturing technologies often give rise to competing objectives on the part of the parties to labor negotiations. Management seeks to introduce labor and cost-saving technology; the employees

through their bargaining representatives seek to preserve job security. See generally, "Automation and Collective Bargaining", 84 Harvard L. Rev. 1822 (1971). The National Labor Relations Act has committed the resolution of these objectives to the mediatory influence of collective bargaining.

In the instant case, Newspaper Printing Corporation sought to reserve to itself, within the new collective bargaining agreement, the right to alter work assignments in order to convert efficiently to "cold-type" technology. It did not seek to remove employees from the existing bargaining unit. Nor did it seek to deny TTU's right to represent the composing room unit in collective bargaining. Yet, the Tenth Circuit Court of Appeals has prevented NPC from gaining contractual control over work assignments. It has determined that insofar as NPC's "management rights clause" would authorize the assignment of work outside the composing room, it gives NPC unlawful discretion over the scope of the bargaining unit. Moreover, it has determined that any proposal by NPC which would modify the existing unit-jurisdiction clause is a permissive subject of collective bargaining.

In so doing, the Court below has confused the right of employees to organize, and to bargain collectively in an appropriate unit through their chosen representative, with a non-existent right to compel, under the circumstances of this case, the readoption of contract language which would prevent any reduction in work assignments to the bargaining unit. NPC is not only denied the right to bargain for flexible control over work assignments. NPC also cannot introduce during the life of the new collective bargaining agreement any automated manufacturing processes that may entail the assignment of work out of the bargaining unit without either TTU's consent or the substantial risk of arbitration penalties.

The decision by the Court below, therefore, improperly impairs management's right to introduce labor-saving machinery for legitimate economic reasons. Moreover, the decision offends policies deeply rooted in the Act by removing the assignment of work and the introduction of new technology from the arena of collective bargaining. A writ of certiorari should issue in order that the substantial federal questions of labor law raised by this case be fully examined and adjudicated.

Respectfully submitted,

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APPENDIX

APPENDIX

PARTIAL LIST OF ANPA MEMBER NEWSPAPERS WITH ITU COMPOSING ROOM CONTRACTS CONTAINING TRADITIONAL UNIT—JURISDICTION PROVISIONS AS OF DECEMBER 30, 1980

Albany (N.Y.) Times-Union & Knickerbocker News
Albert Lea (Minn.) Tribune
Altoona (Pa.) Mirror
Ashland (Ky.) Independent
Atlanta (Ga.) Constitution & Journal
Aurora (Ill.) Beacon-News
Austin (Minn.) Herald
Bangor (Maine) Daily News
Beaver (Pa.) Beaver County Times
Birmingham (Ala.) News & Post-Herald
Bloomington (Ill.) Daily Pantagraph
Bloomington (Ind.) Herald-Telephone
Boston (Mass.) Globe & Herald American
Brantford (Ontario) Expositor
Chicago (Ill.) Lerner Newspapers
Chicago (Ill.) Wall Street Journal
Chicopee Falls (Mass.) Wall Street Journal
Chillicothe (Ohio) Gazette
Cleveland (Ohio) Press & Plain Dealer
Cleveland (Ohio) Wall Street Journal
Columbia (Mo.) Missourian
Council Bluffs (Iowa) Nonpareil
Cumberland (Md.) News & Times
Dallas (Texas) Times-Herald
Dallas (Texas) Wall Street Journal
Denver (Colo.) Rocky Mountain News
Des Moines (Iowa) Register & Tribune
Detroit (Mich.) Free Press & News
Durham (N.C.) Herald & Sun
Elizabeth (N.J.) Journal

Ellwood (Pa.) Ledger
Eugene (Ore.) Register-Guard
Fairmont (West Va.) Times & West Virginian
Fall River (Mass.) Herald News
Fond Du Lac (Wis.) Reporter
Fort Lauderdale (Fla.) News
Frankfort (Ind.) Times
Fredericton (New Brunswick) Daily Gleaner
Glen Falls (N.Y.) Post-Star
Greensboro (N.C.) News & Record
Greensburg (Pa.) Tribune-Review
Greenville (Ohio) Advocate
Greenville (Pa.) Record-Argus
Hagerstown (Md.) Herald & Mail
Halifax (Nova Scotia) Chronicle-Herald & Mail-Star
Harrisburg (Pa.) Patriot & Evening News
Hazleton (Pa.) Standard-Speaker
Highstown (N.J.) Daily Racing Form
Hilo (Hawaii) Tribune-Herald
Honolulu (Hawaii) Advertiser & Star Bulletin
Houston (Texas) Chronicle & Post
Huntington (Ind.) Herald Press
Hyannis (Mass.) Cape Cod Times
Indianapolis (Ind.) Star & News
Ironton (Ohio) Tribune
Jackson (Tenn.) Sun
Jacksonville (Ill.) Journal & Courier
Jefferson City (Mo.) Capital News & Post-Tribune
Jersey City (N.J.) Journal
Johnstown (Pa.) Tribune-Democrat
Kansas City (Mo.) Star
Kenosha (Wis.) News
La Porte (Ind.) Herald-Argus
Lancaster (Ohio) Eagle-Gazette
Las Vegas (Nevada) Sun
Laurel (Miss.) Leader-Call

Lawrence (Mass.) Eagle-Tribune
Lawton (Okla.) Constitution & Press
Lethbridge (Alberta) Herald
Long Beach (Calif.) Independent & Press-Telegram
Long Island (N.Y.) Newsday
Lowell (Mass.) Sun
Lynn (Mass.) Item
Macon (Ga.) Telegraph & News
Manitowoc (Wis.) Herald-Times-Reporter
Mankato (Minn.) Free Press
Meadville (Pa.) Tribune
Medford (Ore.) Mail Tribune
Michigan City (Ind.) News Dispatch
Middletown (Conn.) Press
Middletown (Ohio) News-Journal
Milwaukee (Wis.) Journal & Sentinel
Mobile (Ala.) Register & Press
Monterey (Calif.) Herald
Mount Vernon (Ill.) Register & News
Newark (N.J.) Star-Ledger
Newark (Ohio) Advocate
New Bedford (Mass.) Standard-Times
New Britain (Conn.) Herald
Newburgh (N.Y.) News
New London (Conn.) Day
Oelwein (Iowa) Daily Register
Oshawa (Ontario) Times
Pekin (Ill.) Daily News
Plattsburgh (N.Y.) Press-Republican
Pomona (Calif.) Progress-Bulletin
Pottstown (Pa.) Mercury
Pottsville (Pa.) Republican
Poughkeepsie (N.Y.) Journal
Providence (R.I.) Journal
Rockford (Ill.) Star & Register-Republic
St. Catharines (Ontario) Standard

St. John (New Brunswick) Telegraph-Journal
St. Joseph (Mo.) News-Press & Gazette
St. Louis (Mo.) Post-Dispatch
St. Louis (Mo.) Daily Record
St. Paul (Minn.) Dispatch
Salem (Mass.) News
Salem (Ohio) News
Santa Cruz (Calif.) Sentinel
Santa Rosa (Calif.) Press-Democrat
Seattle (Wash.) Times & Post-Intelligencer
Sheboygan (Wis.) Press
Silver Spring (Md.) Wall Street Journal
Sioux City (Iowa) Journal
South Bend (Ind.) Tribune
Springfield (Ohio) Sun & News
Superior (Wis.) Telegram
Topeka (Kans.) Capital & State Journal
Torrington (Conn.) Register
Traverse City (Mich.) Record-Eagle
Troy (N.Y.) Times-Record (Confidential)
Union City (N.J.) Dispatch &
Patterson (N.J.) News
Vincennes (Ind.) Sun-Commercial
Waco (Texas) Tribune-Herald
Washington (Pa.) Observer-Reporter
Waterloo (Iowa) Courier
Wichita (Kans.) Eagle & Beacon
Winona (Minn.) News
Woodbury (N.J.) Gloucester County Times
York (Pa.) Dispatch
Youngstown (Ohio) Vindicator

(Total newspapers = 133)